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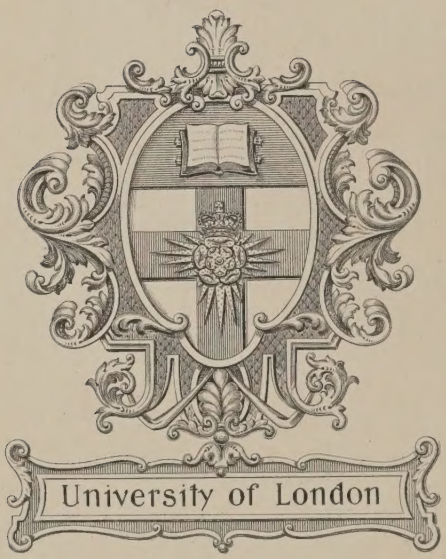

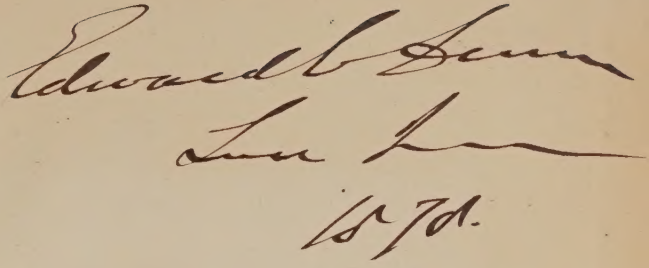

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BY

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AND

IN THE COURT OF APPEAL

BY

CHARLES MARETT, WILLIAM MILLS, AND
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AND BY THE

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AND BY THE

ECCLESIASTICAL COURTS

XL VICTORIA.

[IN THE COURT OF APPEAL.]

1876
Nov. 8.

WESTHEAD *v.* WESTHEAD AND GORDON.

Practice—New Trial in Divorce Court—Appeal from Refusal of Rule to shew Cause—Divorce Court Act, 1860, *s.* 2—*Judicature Act*, 1873, *s.* 19—*Appellate Jurisdiction Act*, 1876, *s.* 20.

The Court of Appeal has no jurisdiction to entertain an appeal from an order of the Judge Ordinary of the Divorce Court refusing or granting a rule to shew cause for a new trial; but the appeal must still be brought to the full Court of Divorce.

Post 77, 8 — 142, 3 — 7 P.D. 16

THIS was a motion for a rule to shew cause why a new trial should not be had before the Judge Ordinary of the Divorce Court or a verdict entered for the respondent. The respondent had made the application in the first instance to the Judge Ordinary of the Divorce Court, who refused the rule, and he now renewed it by way of appeal before the Court of Appeal.

Inderwick, Q.C., in support of the motion. By the 55th section of the Divorce Court Act, 1857 (20 & 21 Vict. c. 85), an appeal was given from the Judge Ordinary to the full Court on all

Followed Robinson v. R post 77.

Explained Blakes v. 7 P.D. 102.

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questions which he had the power of deciding; but by the 10th section petitions for dissolution of marriage and applications for a new trial were to be made before the full Court in the first instance. By the 18th section of the Divorce Court Act, 1858 (21 & 22 Vict. c. 18), the Judge Ordinary was empowered to make orders nisi for a new trial; but the rule absolute was still to be made by the full Court. Then, by the 1st section of the Divorce Court Act, 1860 (23 & 24 Vict. c. 143), power was given to the Judge Ordinary to determine all such matters as might have been before determined by the full Court, with the assistance, if he should desire it, of a second judge; and the 2nd section provided that, in addition to the cases in which an appeal to the full Court then lay from the decision of the Judge Ordinary, an appeal might be brought from the decision granting or refusing a new trial to the full Court, whose decision should be final. By the 19th section of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Divorce Court is made a branch of the High Court of Justice; and by the 19th section power is given to the Court of Appeal to hear appeals from any judgment of the High Court of Justice or any judge thereof, with certain exceptions not affecting the present case. But by the 20th section of the Appellate Jurisdiction Act, 1867 (39 & 40 Vict. c. 59), it is enacted that where by any Act of Parliament it is provided that the decision of any Court or judge, the jurisdiction of which is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice or any judge thereof to the Court of Appeal. No new rules have been made since the Judicature Act to regulate the practice of the Divorce Court. Under these circumstances it may be contended that the respondent ought to have appealed to the full Court of Divorce, but that Court rarely, if ever, sits, and this application is, therefore, rightly made to the Court of Appeal.

JAMES, L.J. We have no jurisdiction to entertain this appeal. The respondent must apply to the full Court of Divorce when it shall sit.

BAGGALLAY and BRAMWELL, JJ.A., concurred.

Solicitors: *Lewis & Whitsed.*

THE SFACTORIA. (A. 368.) 1876

Nov. 7.

Practice—Necessaries—Admiralty Action in Rem—Non-delivery of Statement of Claim—Supreme Court of Judicature Act, 1875 (38 & 39 *Vict. c.* 77) *s.* 18 —*Schedule* 1, *Order XXIX., Rule* 2; *Order XXXVII., Rule* 1.

The second rule of Order XXIX. in the 1st schedule annexed to the Judicature Act, 1875, does not apply to proceedings in an Admiralty action in rem where no statement of defence has been delivered. In such a case the practice, prevailing in the High Court of Admiralty immediately before the coming into operation of the Judicature Acts, must be followed.

This was an Admiralty action of necessaries, instituted on behalf of J. Abbott and F. P. Adey of Cardiff, ship chandlers, against the Greek ship *Sfactoria*. The writ was issued on the 26th of July, in the present year, and was indorsed as follows: "The plaintiffs claim for 900*l.* for necessaries supplied to the *Sfactoria* whilst lying at Swansea." The *Sfactoria* was arrested in the suit, and an appearance was subsequently entered on behalf of her owners, but no bail having been put in, the vessel remained under arrest.

A statement of claim was delivered on behalf of the plaintiffs on the 18th of September last.

The defendants did not deliver any statement of defence. After the expiration of eight days from the delivery of the statement of claim, the solicitors for the plaintiffs gave notice of motion, that they should by counsel move the judge in Court for an order that, the defendants having failed to deliver their statement of defence within the time limited by Order XXIX., Rule 2, the plaintiffs should be at liberty to sign final judgment for 551*l.* 13*s.* 9*d.*, together with interest, as claimed in the statement of claim, and costs of the suit, and for an order that a commission do issue for the sale and appraisement of the *Sfactoria*, and that the proceeds thereof be brought into the registry of the Court.

Nov. 7. *E. C. Clarkson*, on the behalf of the plaintiffs, moved in accordance with the terms of the notice of motion. The claim in this action is for a liquidated demand, and therefore if Order XXIX., Rule 2, does apply to an Admiralty action in rem the plaintiffs have adopted the right course. It would, however, seem at least

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doubtful whether, considering the peculiar consequences which flow from a judgment in rem, Order XXIX. was ever intended to apply to proceedings other than proceedings in personam, and if in the opinion of the Court the provisions of Order XXIX. do not apply, the practice of the High Court of Admiralty with regard to default in pleadings must be considered to remain in force (38 & 39 Vict. c. 77, s. 18); it will then be necessary for the plaintiffs to deliver a conclusion and set the action down for hearing (Admiralty Court Rules, 1859, rules 75, 80, and 105), when in the discretion of the Court the action might come on for hearing on affidavits.

[He referred to 38 & 39 Vict. c. 77, sch. 1, Order XXXVII., Rule 1, and *The Polymede.* (1)]

No counsel appeared on behalf of the defendants.

SIR ROBERT PHILLIMORE. As at present advised, and feeling as I do the difficulties which must arise from any other conclusion, I do not think that the legislature can have intended Rule 2 of Order XXIX. in the schedule annexed to the Judicature Act, 1875, to apply to the proceedings in an Admiralty action in rem. I am therefore of opinion that in the present and similar cases the practice of the High Court of Admiralty in force before the coming into operation of the Judicature Acts must be followed.

No notice will be required to be given to the owners, as the arrest of the vessel is notice of the proceedings to all the world.

I have been referred to Rule 1 of Order XXXVII., but independently of that rule, I should be of opinion that in these cases I have power to order the evidence to be taken on affidavit. I shall order the motion to stand over till next motion day, and give leave that the allegations in the statement of claim be proved by affidavits.

Solicitors for plaintiffs: *Ingledew, Ince, & Greening.*

(1) 1 P. D. 121.

[IN THE COURT OF APPEAL.]

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Dec. 8.

THE MEDINA. (N. 57.)

Inequitable Agreement—Salvage—Life Salvage.

A ship with 550 passengers was ashore in the Red Sea. Another ship came up, and refused to take the passengers to their destination for less than 4000*l.* An agreement was thereupon made between the captains of the ships for payment of the 4,000*l.* The passengers were taken accordingly, and an action was brought for the 4000*l.*:—

Held, affirming the decision of the judge of the Admiralty Division, that the agreement was inequitable, and could not be enforced, but that 1800*l.* should be paid for the salvage services.

5 P.D.8
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8 P.D. 116

An English steamship, the *Medina*, bound from Sumatra to Jedda, having on board as passengers 550 pilgrims, was wrecked in the Red Sea. The pilgrims took refuge on a rock, where, if bad weather had set in, they would have been exposed to imminent danger. In answer to signals of distress, a steamship, the *Timor*, belonging to the plaintiffs, came up, and her master refused to rescue the pilgrims for a less sum than 4000*l.*, which was the amount of the passage-money to be paid to the owners of the *Medina* for carrying the pilgrims from Sumatra to Jedda. Ultimately the master of the *Medina* signed an agreement to pay 4000*l.* to the master of the *Timor* for taking the pilgrims to Jedda; and the pilgrims were accordingly taken in the *Timor* to Jedda. The owners of the *Timor* brought an action claiming 4000*l.* under the agreement. The judge of the Admiralty Division held that the agreement was inequitable, and could not be enforced, but awarded to the owners of the *Timor* 1800*l.* for her services. (1)

The owners of the *Timor* appealed.

The facts of the case are fully stated in the report below, except that there was some evidence of offers by the captain of the *Timor* to refer the amount, or to take the pilgrims to Suez for a smaller sum, the effect of which is stated by James, L.J., in his judgment.

Cohen, Q.C., and *Wood Hill*, for the owners of the *Timor*. Unless

(1) 1 P. D. 272.

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the agreement is clearly bad, the Court will enforce it: *The Helen and George.* (1) In *The Cargo ex Woosung* (2) the salvor was a Queen's ship. The service here was in fact safe and easy, but might have involved loss and difficulty: *The Waverley.* (3) Moreover, the evidence shews that there was no extortion, and that the agreement was deliberately entered into.

W. Williams, Q.C., and *Myburgh*, for the defendants, were not called upon.

JAMES, L.J. I am of opinion that the decision of the Court below was a right decision upon the balance of evidence. If the story of the defendants as to the offer to refer is right, the story of the plaintiffs is wrong; but we see no reason for coming to a different conclusion from that at which the Court below arrived. Therefore we start from this fact, that there was no such preliminary offer. Then we come to the question whether this was an exorbitant sum extorted by compulsion, making it impracticable that the agreement could be enforced. It was stated that there were on a rock 550 pilgrims whose lives might have been endangered at any moment. There was one ship, and one ship only, near them, and the master of that ship says, "I will take them to Suez for 3000*l.*; I will not take you for a farthing less." The contract involved nothing whatever but the mere taking the men on board and carrying them on to Suez. Afterwards he says—"I will take them to Jedda for 4000*l.*" The master denies asking the 3000*l.*; but, on his own account, a sum of 4000*l.* was a very exorbitant sum for only a few days' work, coming up to the rock, taking the pilgrims on board, and carrying them on to the point defined. I agree that the conclusion of the judge of the Admiralty Court was right, that the sum exacted was exorbitant, and, having regard to the peculiar circumstances, that pressure was exercised, and that the agreement ought not to stand. But the Court was right in giving a reasonable amount, fixed by the Court below with the assistance of two assessors, at 1800*l.* On one side there was salvage to be paid, and on the other side there was an

(1) Swa. Adm. 368. (2) 1 P. D. 260.
(3) Law Rep. 3 A. & E. 369.

attempt to set up an agreement, and it was right that there should be no costs on either side.

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BAGGALLAY, J.A. I am of opinion that the principle of the cases was expressed correctly by Dr. Lushington in the case of *The Theodore* (1), that an agreement for salvage should be upheld unless obtained by compulsion or fraud. But by the very fact that we find an amount agreed to be paid which is very large in comparison with the services rendered, we are led to the conclusion that there may have been some unfair dealing in the transaction. And that applies with particular force where persons, who are in an extremity, in order to obtain assistance in their extremity, have been required to pay a large price for the assistance. That appears to have been the case here, and with 550 pilgrims on board the captain of the *Medina* was bound to accept any terms which were pressed upon him by the *Timor*.

BRETT, J.A. I think the old rule of the Admiralty Court ought not to be lightly encroached upon, viz., that where there is an agreement made by competent persons and there is no misrepresentation of facts, the agreement ought to be upheld, unless there is something very strong to shew that it is inequitable; but I think that this agreement cannot be upheld. The amount claimed by the *Timor* was exorbitant—not merely too large, but, for the services to be rendered, grossly exorbitant—and it was forced upon the captain of the *Medina* by practical compulsion. Now, that the sum was grossly exorbitant, I think, follows from this consideration—that the service was one of no difficulty at all, and, under the circumstances, there was no danger whatever to the salving ship. She could take these people off with perfect facility; the service was not an onerous service; the pretence of a difficulty in going into a known port like Jedda is fallacious; from the beginning to the end there was no difficulty or danger to the salving ship; and at the time the agreement was made there was no probability of any danger to her. But there is more in this case. It was forced upon the captain of the *Medina* by practical compulsion, because his position was this—and that is to be considered—he was

(1) Swa. Adm. 351, 352.

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the captain of a ship ashore on a rock with 550 pilgrims on board her. If the captain refused to accept the terms, he took upon himself the responsibility of allowing 550 human beings under his care to be left to the danger of being drowned. That is compulsion to the mind of any honest man. Therefore, I think there was a grossly exorbitant sum obtained on practical compulsion. Under all these circumstances I think that by the rules of the Admiralty Court the agreement cannot stand.

Appeal dismissed.

Solicitors for plaintiffs: *Brooks, Jenkins, & Co.*
Solicitors for defendants: *Dawes & Sons.*

Dec. 8.

[IN THE COURT OF APPEAL.]

THE FRANCONIA. (B. 207.)

Overtaking Vessel—Crossing Vessel—Regulations, Articles 14, 16—*English Channel—Proper Course.*

A vessel is overtaking another vessel, within the meaning of articles 16 and 17 of the Regulations, and not crossing the other vessel, within the meaning of article 14, when she is going faster than the other vessel and is so much behind her as to be unable to see the side light of the other vessel.

In the English Channel the rules as to vessels at sea, and not the rules as to vessels in a river, apply; and in the English Channel there is no customary course for vessels.

ACTION for damages by W. Burrell and others, the owners, master, and crew of the *Strathclyde*, against the owners of the *Franconia*.

The *Strathclyde* was a steamer of 1254 tons, on a voyage from London to Bombay. Between 3 and 4 p.m., on the 17th of February, 1876, in a moderate breeze and cloudy weather, she had landed her pilot at Dover, and was steering S.W. by S., in order, as she alleged, to get a proper offing and to proceed down channel. The *Franconia* was a German steamer of 2111 tons, on a voyage from Hamburgh to Havre and thence to the West Indies, going down channel steering a somewhat more westerly course than the *Strathclyde*, and was on her port quarter; as to

Scan anepl. post 163.

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the exact angle there was a conflict of testimony. The vessels first saw one another when about two miles apart, and according to the *Strathclyde* the *Franconia* was faster and gained on the *Strathclyde*, coming within a quarter of a mile from her, but as to the exact distance there was a conflict of testimony. The *Strathclyde* then ported her helm half a point. About a minute afterwards the *Franconia* put her helm hard-a-port, and stopped and reversed her engines. She, however, struck the *Strathclyde* on the port-quarter, about sixty feet from the stern, doing her so much damage that she sunk in a few minutes, and many of her passengers and crew were drowned.

On the part of the *Strathclyde* it was alleged that those on board the *Franconia* improperly neglected to keep a good look-out, and to keep out of the way of the *Strathclyde*, and that the helm of the *Franconia* was improperly ported.

On the part of the *Franconia* it was alleged that she expected the *Strathclyde* to take a proper channel course, which she neglected to do, and steered across the bows of the *Franconia*, causing danger of collision, whereupon the helm of the *Franconia* was ported and her engines stopped and reversed, and the *Strathclyde* was signalled to keep away. That the *Strathclyde* improperly steered across the bows of the *Franconia*, and neglected to comply with article 16 of the Regulations; and damages were claimed by the *Franconia*.

1876. May 9. At the trial before Sir Robert Phillimore and two Elder Brethren of the Trinity House, it was admitted that the *Franconia* was to blame; and the only question left was, whether the *Strathclyde* was not also to blame.

SIR ROBERT PHILLIMORE delivered judgment, and after stating the facts as above, and that it was the opinion of the Court that the *Franconia* was to blame in steaming away and not attempting to assist the *Strathclyde*, proceeded:—We do not think that, having regard to this statement of facts, the *Strathclyde* was a vessel approaching the other so as to involve risk of collision in the sense of the 16th article, and therefore bound to slacken her speed, because before the *Franconia* ported there was no reasonable

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ground of apprehension of collision, or, in other words, the two vessels were not so approaching as to involve risk of collision, in the ordinary meaning of the words. It was only the sudden and wrong manœuvre of the *Franconia* in porting that involved the risk of collision, not previously existing, and after the *Franconia* had ported, the only chance of escaping collision, I am advised, was by the execution of the manœuvres adopted by the *Strathclyde*, namely, going full speed, and putting her helm hard to port. The vessels were, in our judgment, crossing vessels in the sense of the 14th article, and not approaching vessels in the sense of the 16th article.

Therefore, upon the whole, I have arrived at the conclusion that the *Strathclyde* cannot be said to have contributed to this collision by transgressing the provisions of the 16th article; and I must pronounce the *Franconia* alone to blame.

From this judgment the *Franconia* appealed.

Dec. 4, 5. *Benjamin, Q.C., Cohen, Q.C., Phillimore,* and *Stubbs,* for the *Franconia.* The *Strathclyde* was taking an unusual and improper course down Channel, and was to blame: *The Velocity* (1); *The Esk.* (2) This misled the *Franconia.* On the evidence the *Franconia* was not going faster than the *Strathclyde,* and was not an overtaking vessel, but a crossing vessel. It was therefore the duty of the *Strathclyde,* according to Art. 16 of the Regulations, to slacken speed and take proper precautions, instead of doing which she continued her course without regard to the *Franconia.* At all events, she ought to have made some signal to the *Franconia.*

Butt, Q.C., E. C. Clarkson, and *R. E. Webster,* for the *Strathclyde,* were not called upon.

Dec. 8. The judgment of the Court (James, L.J., Brett, and Baggallay, JJ.A., assisted by two nautical assessors) was delivered by

BRETT, J.A. In this case the judge of the Admiralty Division found that the *Franconia* was solely to blame upon these grounds.

(1) Law Rep. 3 P. C. 44. (2) Law Rep. 3 P. C. 436.

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The judge and the elder brethren found that the vessels were crossing vessels; but that, although they were crossing vessels, yet the *Strathclyde* was not at all to blame for not slackening her speed as the vessels were coming together. Now, we are all of opinion that the judgment of the Court below is in its result correct, and that the *Franconia* was solely to blame. But we do not agree with the reasons which were given by the Court below for arriving at that result. We take it, upon the evidence as a whole, to be proved that the position of the ships was very much what the captain of the *Strathclyde* stated it to be, viz., that when the ships had taken the two courses which they resolved to hold for some time, the *Franconia* was about two points on the port quarter of the *Strathclyde*. It is true that the ships were then taking two courses, the lines of which, mathematically, would at some time cross each other; but the question is, whether, under the circumstances, the ships were crossing ships within the sailing rules, or whether one was a ship overtaking another. Now, if the two ships were in the position and upon the two courses indicated, it seems impossible that the *Franconia* could ever reach the *Strathclyde* unless she was going faster than the *Strathclyde;* and we all think that the evidence is conclusive to shew that the *Franconia* was going faster than the *Strathclyde*, and the gentlemen who advise us are of the same opinion. It is true that there is parol evidence as to the pace or the speed of each vessel, and that evidence may look as if the two vessels were going at the same, or as nearly as possible at the same, speed. But if you once ascertain that the two ships were in the position which I have stated, and were taking the courses which it is admitted on both sides were the courses, it is impossible that the *Franconia* could have touched the *Strathclyde* unless she was going faster than the *Strathclyde*. Therefore I take it that the two ships were as nearly as possible in the position described by the captain of the *Strathclyde*, and that the *Franconia* was going faster than the *Strathclyde*, and that their courses would eventually, at some point, cross each other.

Now, under those circumstances, the question seems to be whether two ships in those positions can be said, within the meaning of the regulations, to be crossing ships. It has been argued as if ships must be crossing, unless they are going in exactly parallel lines,

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or in lines as nearly as possible parallel. I cannot think that that is the meaning of these regulations. The 13th speaks of two ships under steam meeting end on, or nearly end on. The 14th speaks of two ships under steam crossing; the 17th says, "every vessel overtaking any other vessel." Mr. Benjamin argued that, although the ships were crossing, they might also be overtaking. I cannot think that that is the true interpretation of these regulations. The rule as to crossing ships uses that term as a term of navigation, not as a mathematical term; and so, when the rule speaks of one ship overtaking another, it is a sea and not a mathematical term. The 17th article of course implies that one ship is going faster than the other, for unless one ship is going faster than another it is impossible to say that she is overtaking another. Can we, then, form a definition of the difference between crossing ships and overtaking ships? It seems to me that this may be a very good definition—I will not say that it is exhaustive, or that it may not on some occasion be found to be short of comprising every case, but I think it is a very good rule—that if the ships are in such a position, and are on such courses and at such distances, that if it were night the hinder ship could not see any part of the side lights of the forward ship, then they cannot be said to be crossing ships, although their courses may not be exactly parallel. It would not do, I think, to limit the angle of the crossing too much, but a limit to that extent it seems to me is a very useful and practical rule. And then if the hinder of two such ships is going faster than the other she is an overtaking ship.

Now if the *Strathclyde* was a mile or a quarter of a mile distant from the *Franconia*, and the *Franconia* was two points on the quarter of the *Strathclyde*, then the *Franconia* could not have seen any part of her side lights, and that, I think, is the opinion of the gentlemen who advise us. That being so, the vessels seem to me not to be in the position of crossing vessels. The *Strathclyde* and the *Franconia* were, therefore, not crossing vessels, and the *Franconia* was an overtaking vessel, and so came within the 17th article. Now, it has been argued by Mr. *Benjamin* that if the vessels are crossing at all, they must be approaching. I do not think it is absolutely necessary to determine that point; but the inclination of my opinion certainly is that if two vessels can properly be said,

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within the meaning of the 14th article, to be crossing vessels, they then must be vessels approaching each other, and if both of them are steamers, the 16th article would apply, and both of them ought to slacken. But it seems to me clear that, where the position of vessels brings them within the 17th article, in which the one is overtaking the other, although they are both steamers, you cannot apply the 16th article to the leading vessel. It is impossible, by any fair construction of language, to say that the leading vessel is approaching the other. She is going away from the other, and it is an abuse of language to say that she is an approaching vessel at all; and, therefore, when one steamship is overtaking another within the meaning of these regulations, the leading ship cannot be said to be approaching the hinder ship, and, therefore, is not within the 16th article.

Now, that being so, the *Franconia* broke almost every rule. She was the vessel overtaking another; and under those circumstances she ought to have kept out of the way. She was a steamship approaching another, and she ought to have slackened her speed. But, until the last moment, she did nothing to get out of the way or to slacken her speed. If what I say is correct, the *Strathclyde* broke no rule, unless it can be said that she eventually broke the 20th regulation. But it seems to me impossible to suppose that they were, as has been stated, a quarter of a mile apart at the last moment when the *Franconia* ported. There is some evidence that she was only three ships' lengths distant from the *Strathclyde* at that time. If she was a quarter of a mile off, and overlapping the other vessel, in my opinion, and according to the opinion of the gentlemen who advise us, the collision could not have taken place as it did. The conclusion, then, is that they were not a quarter of a mile off, but three lengths apart at the time when the *Franconia* ported. If this be true, the *Strathclyde*, up to that time, having broken no rule, can it be suggested that she then broke a rule? On the contrary, it was found in the court below, and it is the opinion of those who advise us here, and it is our opinion, that so far from breaking any rule of navigation at the time, the *Strathclyde* did the very best thing she could do—she did yield half a point to the *Franconia*, and afterwards yielded more by putting her helm hard a-port; and it is our opinion, and

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of those who advise us, that that is the best thing she could have done to avoid the effects of the wrong conduct of the *Franconia*. Therefore, the *Franconia* broke the rules; the *Strathclyde* broke no rule.

But it has been suggested that the *Strathclyde* misled the *Franconia*. Now, I confess that seems to me to be an untenable argument. First of all, it rests upon an assumption that the *Franconia* had a right to keep on her course, not only as to direction but as to the place in which she was, and that because the *Strathclyde* was coming out of Dover Harbour, she ought either to have yielded to the *Franconia*, or to have ported her helm so as to go a course down channel which would keep her on the starboard side of the *Franconia*. That is so, it is said, because the *Franconia* was going down on the usual course; and it was likened to the cases of the *Velocity* (1) and the *Esk* (2), and Mr. Phillimore invited us to say that the same rules were applicable to the English Channel as are applicable to a river with a winding course. It is the first time that such a proposition ever was put forth. The regulations are made for the sea. The reason why, in the cases of *The Velocity* (1) and *The Esk* (2), it was held that the regulations did not apply, was because, as a matter of fact, they are held to be inapplicable to a winding river. In such case the rules are those customary in that river. But this does not apply to the Channel. There is no usual course in the Channel in the sense in which it was argued. The ships in the English Channel are at sea, and the only sailing rules which are applicable to them under those circumstances are those which have been enacted and are contained in the regulations. Those cases are therefore, not applicable.

Therefore, on the whole, taking the position of these ships to have been what we find them to be, and taking their courses to have been what is admitted, we are of opinion that the *Franconia* was a vessel overtaking the *Strathclyde;* that the vessels were not crossing vessels; that the *Strathclyde* was not a vessel which can be said to have been approaching the *Franconia;* that the *Franconia* was an overtaking and an approaching ship; that she broke the regulations; that she broke them up to the end; that the

(1) Law Rep. 3 P. C. 44. (2) Law Rep. 3 P. C. 436.

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Strathclyde broke no rule either before the collision was imminent or when the collision was inevitable. We are of opinion, therefore, that the *Franconia* was an overtaking ship, and that the *Strathclyde* was not a crossing ship. We agree with the Admiralty Court that the *Franconia* was to blame. We cannot agree with the decision of the Admiralty Court that the two ships were crossing ships; and we hold that the *Strathclyde* was not bound to diminish her speed.

Appeal dismissed.

Solicitors for the *Strathclyde*: *Stokes, Saunders, & Stokes.*
Solicitors for the *Franconia*: *Gellatly & Warton.*

[IN THE COURT OF ARCHES.]

July 13.

CRISP *v.* MARTIN AND OTHERS.

Faculty—Prescriptive Right to Pew—3 & 4 Wm. 4, c. 71, s. 2.

A parishioner who claims a legal right by prescription to a pew in the nave of his parish church must, in order to displace the general right of the ordinary, not only shew that the pew has been occupied by him or his predecessors in title in respect of an ancient house in the parish for a period more or less extended, but must also prove, if any alteration or repair of the pew has been necessary, that such repairs or alterations were executed at the expense of those who at the time claimed the prescriptive right to it.

Semble, s. 2 of the Prescription Act, 3 & 4 Wm. 4, c. 71, does not apply to a claim by prescription to a pew in the nave of a parish church.

THIS was an appeal from the Consistory Court of Ely in a cause of faculty.

In the month of April or May, 1875, the Rev. William Martin, vicar of the parish of Grantchester, in the county of Cambridge, and H. J. Banyard and F. W. Lilley, the churchwardens of the same parish, presented a petition to the learned chancellor of the diocese of Ely (Isambard Brunel, Esq.), praying for the grant of a faculty, authorizing them to carry out and complete certain repairs and alterations in the parish church of Grantchester.

The usual citation, with intimation out of the registry at Ely,

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having been duly served, an appearance was entered for Horace Edward Crisp, a parishioner and inhabitant of Grantchester, and his proctor, in an act on petition, alleged inter alia as follows:—

1. The said Horace Edward Crisp is the owner and occupier of an ancient house situate in the parish of Grantchester.

2. The said Horace Edward Crisp objects to the faculty prayed for being granted, in so far as it relates to taking down the south wall of the nave and building a new south wall and south aisle; to taking up and relaying all the floor of the church; to clearing out all the present seats, except those in the west gallery, and to providing benches of deal. The said Horace Edward Crisp objects on the grounds hereafter set forth, to wit:

The proposed addition of a south aisle will necessitate the demolition of an old family vault known as the Manor Vault, belonging to the said H. E. Crisp, and which has for a long time been appropriated for the burial of members of his family, and in which are buried the remains of his ancestors, and which contains vacant space for a great number of coffins.

By the aforesaid alterations the said H. E. Crisp will be deprived of a pew situate on the south side of the nave in the said church, the exclusive occupation of which he claims by prescription, he and his ancestors and the former occupiers of the said house now owned and occupied by him having from time out of mind enjoyed the exclusive use of the said pew, and having always repaired the same.

The said church was renovated, and repaired, and re-seated about twenty years ago, and the present pews are in good and substantial repair, and the said H. E. Crisp strongly objects to his prescriptive pew being pulled down and replaced by deal benches. (1)

On behalf of the petitioners an answer was filed, which, so far as material to this report, was in substance as follows:—

1. There is not any ancient house in the parish of Grantchester belonging to the said H. E. Crisp, nor is the house in which he now lives, as it now stands, an ancient house. In reply to the grounds of objection in the act on petition set forth, it is hereby alleged:

That the vault in the said act on petition alleged to belong to the said H. E. Crisp is not his property, and does not belong to him, but if it be the property of any one,—no faculty having been obtained for it,—belongs to the petitioner F. W. Lilley, or to his brother Mr. Lilley, who does not oppose the alterations proposed.

That when the alterations are concluded the vault will be within the church beneath the floor of the aisle.

That the said H. E. Crisp has not any such title to the exclusive occupation of the said pew on the south side of the nave as is in that behalf alleged in the said act on petition, and that in fact when the said church was repaired and

(1) The substance of other allegations contained in the act on petition is stated in the judgment of the Court at Ely.

re-seated, about twenty years ago, that is to say, in the year 1856, the said pew, together with other pews, was rebuilt by the parish out of moneys derived from parochial funds, and from voluntary donations contributed to the vicar and churchwardens for re-seating the church by Corpus Christi College and King's College.

The cause was heard at Ely on the 6th of December, 1875, when Benjamin Shaw and D. D. Ledsam appeared for the petitioners, and Dr. Tristram for the opponent.

The material result of the evidence, which was in part taken orally and in part by affidavit, is stated in the judgments of this Court and of the Court below.

Cur. adv. vult.

Dec. 20, 1875. I. BRUNEL, ESQ. This is an application for a licence or faculty on the part of the vicar and churchwardens of the parish of Grantchester, to authorize them to repair and enlarge the parish church. This application was made by them in obedience to the rule of ecclesiastical law, which requires that no alteration shall be made in the fabric, ornaments, or furniture of a church without the permission of the ordinary, pronounced through a decree of his Consistorial Court. These proceedings were commenced by the presentation of a petition by the vicar and churchwardens, setting out the various works for which they desired the sanction of the Court. A citation was issued on the 6th of May in the present year, reciting the petition, and calling on all persons having or pretending to have any interest in the premises to shew cause why a faculty should not issue, and intimating that if no appearance was entered, or no sufficient cause shewn, a faculty would be decreed. This citation was duly published on the 9th of May; and in the exercise of his undoubted legal right, Mr. Horace Edward Crisp, a parishioner of Grantchester, entered an appearance and filed an act on petition, stating certain objections to the grant of the faculty, and praying that it be not granted, and that the petitioners be condemned in costs. To this a reply was filed by the petitioners. By permission of the Court, the evidence of witnesses was taken by affidavit in cases in which it was feared that they would be unable to attend by reason of age, infirmity, or absence from England. Other evidence was taken orally on the 6th instant, and counsel were heard for both parties. Judgment was reserved, and has now to be given.

The works which the petitioners desire to carry out may be conveniently arranged under five heads, as follows:—1. A warming apparatus for the church. 2. A new roof to the nave. 3. A new south wall and a south aisle to the nave. 4. A new floor. 5. The substitution of benches of deal for all the present seats in the body of the church, except those in the west gallery.

To the warming apparatus Mr. Crisp raises no objection whatever; and he offers no formal objection to the erection of a new roof.

Mr. Crisp objects to the demolition of the south wall of the nave and to the erection of a south aisle and to a new floor. [The learned Chancellor here discussed the evidence on this point, and came to the conclusion that a new roof was necessary, and that the south wall should be rebuilt.]

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The further question arises,—shall the area of the church be enlarged? and this depends upon the extent of the present accommodation, as compared with the size of the parish. There is, it is admitted, besides the parish church of St. Andrew's, a temporary church, St. Mark's, in that part of the parish which is nearest to Cambridge; but it was argued that there is no permanent endowment for St. Mark's, and that even if that church should be maintained, the increase of population in the neighbourhood of the parish church makes an enlargement of it expedient. The evidence of Mr. Martin, the vicar, Mr. Howard, the late curate, Mr. Morse, who has searched the census returns, and Mr. Creswell, who made a census himself, satisfies me that the population of Grantchester is such that it would be desirable that the parish church should be enlarged; and when I also find that the funds have been provided, that a large number of parishioners have subscribed, that ninety tradesmen and labourers have asked for the enlargement, and that the parishioners in vestry have approved, or, at any rate, did not oppose, the scheme, I cannot allow the opinion of Mr. Crisp to prevail with me upon the question.

It was urged that, if I should come, as I have done, to the conclusion that an enlargement of the church is expedient, that enlargement could be better made on the north side than on the south, because fewer graves would be disturbed, and a certain vault called the "Manor Vault," would be left untouched. I shall have, hereafter, to speak at length as to this vault in reference to the claim of Mr. Crisp. As the vault will be carefully closed up, I do not see any objection on sanitary grounds, to its inclusion within the church. With regard to the number of graves to be disturbed, the evidence is, I think, in favour of there being fewer graves to be disturbed on the south side than on the north; and the fact that the south wall will have to come down if a new roof is to be erected, is a sufficient reason, even if no others exist, for placing the aisle on the south side. It is, of course, to be regretted that the bodies of the dead should be disturbed; but if such considerations were to prevail, they would in most cases be fatal to any plans for church extension, and the conditions invariably inserted in faculties granted by this Court—namely, that human remains shall be re-interred under the direction of the incumbent, are sufficient to prevent any desecration, and indeed have, in this case, satisfied Mr. David Beaumont, a gentleman who had opposed the alterations, until he was told that these precautions would be observed.

The objections which I have hitherto been considering, have been of a general character, and might have been brought before the Court by any parishioner. I have now to deal with an objection of a personal nature. Mr. Crisp states that the proposed erection of a south aisle would interfere with a certain vault known as the "Manor Vault," in which he has an interest. There is no dispute as to the existence of this vault, or as to the fact that it would be inclosed wholly or partially within the new aisle, and would be unavailable for future interments. The evidence of Mr. Blomfield is, that, although the crown of the vault would have to be lowered, it would not be necessary to remove any bodies. Mr. Crisp objects to any such treatment of the vault. It was stated that this vault was constructed in or about the year 1831. At the time of its construction, Mr. Edward Lilley, for whom it was built, paid to the then vicar the sum of ten guineas. In this vault are buried the bodies of Mr. Edward Lilley, his wife, and all his deceased children, save two. The only living children are Mrs. Isabella White, a widow lady, who

left Grantchester in 1849, and now lives in Little Rock, Arkansas, in the United States of America, and Mr. Frederick Wills Lilley, one of the petitioners. There was another son living at the commencement of these proceedings, Mr. Thomas Lilley, but he is lately dead, and was buried in a different part of the churchyard. Mr. Crisp, who opposes the faculty, is the grandson of Mr. Edward Lilley, through a deceased daughter; and his complaint is that the proposed south aisle and the new floor will necessitate "the demolition of an old family vault, known as the "Manor Vault," belonging to him, and which has been for a long period of years appropriated for the burial of members of his family, and in which are buried the remains of his ancestors, and which contains vacant space for a great number of coffins." In the first place, it must be observed that it is not contended that there was any right to this vault conferred upon Mr. Edward Lilley by a faculty from this Court; and the payment of a fee to the incumbent does not bind this Court in dealing with the vault. But what is the grievance here? It is not a "demolition" of the vault, as Mr. Crisp alleges, or the "destruction" of it as alleged by Mrs. White, but as stated above—the lowering of the crown of the vault without any removal of the bodies and the inclosure of it within the church. The only ground on which a complaint can be made if the vault is now to be closed for interments is, that it is not yet filled with bodies, and that therefore the existing descendants of Mr. Edward Lilley have a claim to be buried in the vault so long as there is any vacant space. Mr. Crisp states in his act that there is room for "a great number of coffins." In his evidence he says, "three, perhaps more;" and another witness says, "three or four." But whatever may be the amount of vacant space, the only person who could now complain of its being left unoccupied is Mr. Frederick Lilley, the male representative of Mr. Edward Lilley; and Mr. Frederick Lilley is one of the petitioners. I am, therefore of opinion that, as regards the south aisle and the new floor, a case has been made out for the petitioners, and that all the grounds of objection fail.

The fifth question raised in these proceedings is of a different character from those which have hitherto been under consideration. Up to this point Mr. Crisp has not objected to the proposed works as being unlawful; he has only invited the Court to pronounce them inexpedient. But in reference to that portion of the petition which asks for permission to "clear out all the present seats except those in the west gallery, and to provide benches of deal," Mr. Crisp calls upon the Court to declare that this alteration cannot legally be effected, inasmuch as it would destroy a pew which he holds by prescription. If this claim is well-founded there can be no doubt but that the Court would be compelled to guard the rights of Mr. Crisp and to require that his pew should be preserved intact. But, whilst this right is a right paramount to the Ordinary, and therefore not to be interfered with by this Court, it is a right which must be clearly proved; and as the presumption is against the existence of such a right, all seats in the body of the church being by the general law at the disposal of the Ordinary for the accommodation of the parishioners, it rests with Mr. Crisp to prove affirmatively that this right exists. I have, therefore, to consider, firstly, what it is that Mr. Crisp has proved, and, secondly, if the facts proved satisfy the requirements of the law.

Mr. Crisp has proved the existence in the parish of an ancient house, now enlarged, and called Byron Lodge, of which he is at present the owner and occupier. He has also proved that a pew on the south side of the nave is now,

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and for a good many years past has been occupied by himself and others, the occupiers for the time being of the house now called Byron Lodge. He admits in his act that the church was re-seated about twenty years ago. There is no evidence that the repairs or the rebuilding of this particular pew was, on this or on any previous occasion, effected at the expense of the occupier of Byron Lodge. Indeed, Mr. Crisp admitted in cross-examination that "he knew nothing about repairs, or if any payments were made." As Mr. Crisp's father occupied the pew when the repairs were made in 1856, it is reasonable to suppose that if any documentary evidence of a payment by Mr. Crisp the elder, or any other assertion of his claim, had been in existence, it would have been forthcoming. But the evidence does not rest here. Not only has Mr. Crisp not proved that the repairs of 1856 were executed at the cost of those through whom he claims, but Mr. Martin has proved that these repairs were executed at the cost of certain local charities, aided by a contribution from King's College, Cambridge.

Such being the facts, do they support the propositions which the law requires that Mr. Crisp should establish? The Dean of Arches, in the case of *Pettman* v. *Bridger* (1), says: "In the first place, it is necessary to shew that use and occupation of the seat has been from time to time immemorial appurtenant to a certain messuage . . . ." Assuming in this case that there is no antecedent improbability in a faculty having been originally granted, and that, as a faculty is not produced, evidence of occupation necessary to support a prescriptive right has been given, the question remains, is the circumstance that Mr. Crisp has shewn no evidence of repair at any time, and that the repairs of 1856 were not done by the then occupier of the house,—is this circumstance fatal to the claim set up by Mr. Crisp? In the above-cited case of *Pettman* v. *Bridger* (1), the Dean of Arches goes on to say, "Secondly, it must be shewn that if any acts have been done by the inhabitants of such messuage they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right." The law therefore requires that if substantial repairs have been done within memory, and in the present case the pew was rebuilt in 1856, those repairs should have been done at the expense of the occupier, or if he did not repair, that he should at the time have in some other way guarded his rights. Neither of these conditions were fulfilled by the occupier of Byron Lodge in 1856. It was argued, however, by the learned counsel for Mr. Crisp, that the dicta contained in this and other cases do not apply to a state of circumstances like the present, where the funds for repair were not obtained by the levy of a church rate. I cannot assent to this proposition. I do not think that it is material that the general repairs should have been paid out of a church-rate. The question is not, out of what fund the rest of the pews were repaired, but, was this particular pew repaired out of the same fund as the rest? In the case cited above, *Pettman* v. *Bridger* (2), the learned judge observes, "The strong probability of fact is, that the alteration was done by the parish. Just before the alteration was made, a Mrs. Lawson left a sum of money to repair and beautify the church. There are several witnesses who say that they believe it was done by the parish or with Mrs. Lawson's money." The learned judge would not have so expressed himself,

(1) 1 Phillim. Eccl. 316.

if it had been material that the repairs should have been paid for out of a church rate, and not out of the legacy. There is no evidence before me as to the precise trusts upon which the charities are held, from which funds were obtained for the repairs of 1856; but it is, I think, proved that the funds derived from these charities were similar to the legacy mentioned in *Pettman* v. *Bridger* (1), in so far as that they were not funds derived from church-rates.

Lastly, my attention was called, not by the pleadings, but by the learned counsel for Mr. Crisp, to the Prescription Act, 2 & 3 Wm. 4, c. 71. I was informed, and I believe correctly, that it has never yet been directly decided if this Act applies to pews. I do not consider it necessary to express an opinion on the point. Even if it be assumed that a pew can be the subject of an easement within the meaning of the Act, and that the Act has been brought before the Court in the proper form, the fact that this pew was rebuilt in 1856 without any payment by the occupier of Byron Lodge and without any assertion of right by him, would still, I think, be fatal to the claim advanced by Mr. Crisp. I am of opinion that Mr. Crisp has failed to prove, as against the Ordinary, that he has a prescriptive right to the pew in question; and I therefore hold that there is no legal objection to the substitution of a bench of deal for Mr. Crisp's pew.

I have had some doubts as to the expediency of reseating the nave, the present seats being in good repair; but I have come to the conclusion that the petition may be granted. The money is subscribed; there is no general opposition to, but rather a general desire for, the alteration; and it is very probable, as stated in evidence, that the seating of the congregation could be more satisfactorily accomplished if the seats were uniform and open. I do not, however, understand that it is asked that the benches should be open in the sense that any person can occupy them. Neither in this nor in any other faculty by which open benches are substituted for pews is there, or can there, be any permission given to the churchwardens to neglect their duty of providing for the proper accommodation of the parishioners. I have no reason to think that in providing accommodation for Mr. Crisp they will fail in their duty towards him. If, however, he should be dissatisfied with their action, the law gives him a remedy. I have now examined all the questions brought before me, and I have decided on every point in favour of the petitioners and against Mr. Crisp. The petitioners have, in that event, asked for costs. On the question of discretion Mr. Crisp did not represent any other parishioner. On the question of law he has failed to establish his claim. I think, therefore, that costs ought to be given to the petitioners.

I decree that the faculty be granted as prayed; and I order Mr. Horace Edward Crisp to pay the costs occasioned by his opposition to such grant.

From the decree made in accordance with this judgment Mr. Crisp appealed to the Court of Arches, and the petitioners having appeared as respondents, the appeal came on to be heard before the Dean of Arches (the Right Hon. Lord Penzance), on the 13th of July last.

Dr. Tristram, for the appellant. This case differs from *Pettman*

(1) 1 Phillim. Eccl. 316.

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v. *Bridger* (1) and the other cases in the books where prescriptive rights to pews have been claimed, for certainly up to 1824, and probably even up to 1854, the parish church of Grantchester (Wildnall's History of Grantchester, 1875), contrary to what was almost universally the case in parish churches in England where the custom was for all the parishioners to be seated in pews, only contained three or four pews, of which number that now claimed by the appellant was one. The presumption, then, arises, not that these pews were erected by the parish, but that they were erected at the costs of the individual parishioners who occupied them. The appellant has thus shewn a legal origin for the right he claims; he has also proved occupancy of the pew for forty years before 1854, and it has not been shewn that the pew required any repairs or alterations during that time. The appellant must therefore be taken to have acquired a legal right by prescription, and the fact that subsequently in 1854 the pew was altered, not at the costs of the parish, but at the costs of third parties, is immaterial: *Knapp* v. *Parishioners of St. Mary's, Willesden.* (2) Even if sufficient evidence has not been given in proof of a prescriptive right in the appellant at common law, the question would still remain whether the provisions of the Prescription Act, 3 & 4 Wm. 4, c. 71, do not apply to pews. The pew in the present case is annexed to an ancient house in the parish, and is in the nature of an easement: *Mainwaring* v. *Giles* (3); *Hinde* v. *Chorlton* (4); Gale on Easements, 5th ed. p. 24. It must therefore come within s. 2 of the same Act, and as a consequence the appellant must, as he and his predecessors in title occupied the pew for forty years previous to 1856, be considered to have obtained an indisputable right to it, which he never intended to relinquish: Gale on Easements, p. 192. As to the vault claimed by the appellant, though it must be admitted that no legal title to it can be shewn: *Ex parte Blackmore* (5); it is submitted that on equitable grounds the Court ought not entirely to disregard the claim.

Benjamin Shaw and *Ledsam*, for the respondents. The appellant has not given sufficient evidence on which the Court can hold that

(1) 1 Phillim. Eccl. 316.
(2) 2 Roberts. Eccl. 358.
(3) 5 B. & Ald. 356.
(4) Law Rep. 2 C. P. 104.
(5) 1 B. & Ad. 122.

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the pew claimed by the appellant was at any time occupied by him in virtue of a prescriptive right: *Parker* v. *Leach* (1); *Morgan* v. *Curtis*. (2) It is quite consistent with the case set up on his behalf that the pew he occupied was appropriated to him by the churchwardens, and that he has merely a possessory right good against third parties, but of no avail against the ordinary and his officers: *Pettman* v. *Bridger*. (3) The Prescription Act was clearly never intended to apply to pews, but only to those rights to which a title could be claimed solely by long enjoyment. The mere occupancy of a pew, for however long, is of no avail against the ordinary; for, in order to oust his jurisdiction, it is necessary that, in addition to sufficient proof of occupancy, some consideration for the exclusive right claimed against him, such as repair within memory, must be shewn: *Buxton* v. *Bateman* (4); *Ashby* v. *Freckleton* (5); *Boothby* v. *Baily* (6); *Kenrick* v. *Taylor* (7); *Pettman* v. *Bridger* (8); *Charlton* v. *Wilson* (9); *Stocks* v. *Booth*. (10) The dictum in *Knapp* v. *Parishioners of Willesden* (11), to the effect that evidence of repair was not indispensably necessary, but merely desirable, only applies to a case where no necessity for repairs can be shewn to have arisen; in this case, however, it is admitted that the pew has been repaired not by the appellant but by the parish authorities; it cannot be necessary, in order to defeat the claim of prescriptive right, to go further and shew that the parish actually paid for the repairs. It must not be forgotten that, if the Prescription Act should be held to apply to pews, the common law right of the ordinary would be taken away in almost every case, for in nearly every parish the parishioners are accustomed to occupy the same seats from year to year, and, if pews were within the Act, at the end of forty years would all acquire a statutory title. Moreover, the Prescription Act can only apply on the assumption that the right to a pew is an easement; now an easement lies in grant, but the right to a pew by prescription is presumed to be founded on a lost faculty, and it can hardly be said

(1) Law Rep. 1 P. C. 312.
(2) 3 M. & R. 389.
(3) 1 Phillim. Eccl. 316.
(4) 1 Sid. 88.
(5) 3 Lev. 72.
(6) Hob. 69.
(7) 1 Wilson, 326.
(8) 1 Phillim. Eccl. 316, 331.
(9) Law Rep. 2 Eq. 656.
(10) 1 T. R. 428.
(11) 2 Roberts. Eccl. 358.

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that a faculty conferred by the judicial authority of the ordinary, in whom the freehold of the church is not vested, is equivalent to the grant of an easement. [They referred to Gale on Easements, p. 169, note x.] Whether or not under any circumstances prescriptive rights to pews could be considered as within the section, it is clear that in the present case sufficient evidence of undisputed possession for the time required by the statute has not been shewn: *Eaton* v. *Swansea Waterworks.* (1)

Dr. Tristram, in reply.

LORD PENZANCE. I had thought that perhaps it was possible that this controversy might be ended in a way that would be satisfactory to both parties without asking for the decision of the Court.

I understand, however, that what one side desires is not capable of being granted by the other. What Mr. Crisp desires is to have something which shall represent what he says is his right,—a continuous and permanent right to this seat as annexed or attached to the house which he occupies; and, on the other hand, what is offered to be granted is an act in favour of Mr. Crisp by the existing churchwardens which would not bind their successors, and would not therefore effect what Mr. Crisp wants. Therefore I must deal with the question of right as it stands.

Now the first question is one of fact, namely, how long Mr. Crisp and those under whom he claims have occupied this pew. I do not think that the occupation of the pew is made out with any great accuracy. On the one side there is evidence to prove that it has been so occupied since 1804 or 1805; on the other side there is evidence that in 1824 the pew did not exist. Upon such a conflict it is enough, I think, to say that the evidence on the subject which is put forward on behalf of Mr. Crisp is not in the result clear and definite. Of course the legal right is in the Ordinary, primâ facie, to arrange the seats in the church as he thinks best and most in conformity with the rights of the parishioners; but that right may be qualified by a legal prescriptive right which any of the parishioners may have obtained in derogation of the general right of the Ordinary. Any parishioner

(1) 17 Q. B. 267; 20 L. J. (Q.B.) 482.

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may claim a right by faculty; but there is no faculty in this case, and therefore the only question is whether Mr. Crisp has made out that he is entitled as a legal right by way of prescription to this pew. The onus is distinctly upon him, and, as I have already said, the length of time during which this pew has been so occupied is not very clearly made out.

But the main difficulty against his claim arises upon the proposition that, in order to displace the general right of the Ordinary, it is necessary not only to shew a user more or less extended of the pew (I say "more or less," because I do not find anywhere a very definite period laid down during which it must have existed), but it is also necessary to prove that he, or those under whom he claims, have taken upon themselves, in relief of the parish, the burthen of repairing it.

Two or three cases, which are old cases, have been cited for that purpose. In Sir Robert Phillimore's book on Ecclesiastical Law, vol. 2, p. 1800, I find he says: "To exclude the ordinary from his jurisdiction it is necessary not merely that a possession should be shewn for many years, but that the pew should have been built and repaired time out of mind." For that proposition the case of *Stocks* v. *Booth* (1) is cited, which is one of the cases that has been referred to. Then again, "Only the reparation of it by the person pleading such prescription, and praying a prohibition thereupon, must of necesssity be alleged here; because the Ordinary in the body of the church primâ facie has the right; and nothing but such private reparation can divest him of that right; which right stands good and entire (notwithstanding possession and use time out of mind) if the parish have but repaired." Then the learned author quotes the case in 1 Wilson 326, and the case in 1 Lev. 71. Those cases certainly, although old, seem to have been adopted as the law in this Court by a very eminent judge in this Court, Sir John Nicholl, in the case of *Pettman* v. *Bridger* (2), because, he says, "A possessory right is not good against the churchwardens and the Ordinary—they may displace and make new arrangements; but they ought not without cause to displace persons in possession; if they do, the Ordinary would reinstate them;—the possession, therefore, will have its weight;—

(1) T. R. 428.

(2) 1 Phillim. Eccl. 316.

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the Ordinary would give a person in possession cæteris paribus the preference over a mere stranger. A possessory right is sufficient to maintain a suit against a mere disturber. The fact of possession implies either the actual or virtual authority of those having power to place."

Then comes the proposition that a disturber may be sued without proving anything more than the possessory right. The learned judge then goes on, "A prescriptive right" (as contradistinguished from a possessory right) "must be clearly proved,—the facts must not be left equivocal,—and they must be such as are not inconsistent with the general right. In the first place, it is necessary to shew that use and occupation of the seat has been from time immemorial appurtenant to a certain messuage, not to lands—the Ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shewn that, if any acts have been done by the inhabitants of such messuage, they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expence of the party setting up the prescriptive right. The onus and beneficium are supposed to go together,—mere occupancy does not prove the right,"—Certainly, I am not aware that there is anything here but occupancy. Mere occupancy is all that the evidence amounts to in this case. Sir John Nicholl says that mere occupancy does not prove the right, and he goes on to say, "What might be the effect of very long occupancy;—where no repairs have been necessary I am not called upon now to say;—it is a common error to suppose that by mere occupancy pews become annexed to particular houses. In country parishes the same families occupy the same pews for a long time, but I apprehend they still belong to the parish at large;—if, however, it is shewn that the inhabitants of a particular house have repaired, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew;—thus the uniform and exclusive possession of the inhabitants of a particular messuage, connected with the burthen of maintaining and repairing the seat, is evidence sufficient to establish a prescriptive title."

If that is a sound exposition of the law, I apprehend that mere

occupancy will not do, and that there ought to be something more than that to oust the jurisdiction of the Ordinary. What has been done in the present case is the other way. There is no proof of any repairing, but still I think there is a great deal of force in Dr. Tristram's observation that you ought not to draw an adverse conclusion from the fact of no repair having been done unless some repair is shewn to be necessary. But I apprehend that a pew would require some repair in the course of seventy or eighty years; and it is not shewn affirmatively that repairs were ever done by Mr. Crisp.

Then comes the year 1856, and then this pew was pulled down entirely according to some of the evidence. Part of the top was taken off according to the view of some of the witnesses; at any rate, the pew was very largely interfered with. That, I think, in a not unreasonable sense, may be looked upon as repairing. It may be that the old pew would have stood longer, but if in the course of making alterations in the church, a particular alteration of the pew in question was made, one would expect that at that time those who claimed the prescriptive right to it would step in and either prevent the thing being done, or if it was done, would take care that it was done at their expense. But, on the contrary, that was done by the parish authorities. Where the funds came from, so long as Mr. Crisp, or those who went before him, did not provide them, is immaterial.

Under these circumstances, I do not think that within the authorities Mr. Crisp has made out a prescriptive right, and no doubt it is material that the Court should not depart from the old authorities lightly, because the effect of doing so would be to create these prescriptive rights, and rights that could not be overborne, in a vast number of persons, and would thereby prevent reasonable alterations in modern times to make churches more convenient for the entire body of the congregation.

Then comes the question about the Prescription Act. At first I was very much struck with the language of that Act as possibly applying to a pew in the nature of an easement, but on further consideration I am satisfied that it does not apply in a case like the present, or, indeed, I may say in any case to a pew claimed by prescription, and for this reason, that the language of the Act

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(and it was a very carefully drawn Act) shews that the object of the Act was to replace the old doctrine of time immemorial, which went back to the reign of Richard II., by a definite period, and nothing more than that. It was not intended to alter the law with regard to what was required to make out a prescription, except in this respect, that the time of prescription was to run back to a much shorter period than the time of Richard II.; and the state of things the Act was intended to deal with was this, that inasmuch as prescription could only be supported by either proving or assuming that the thing had existed from the time of Richard II. and downwards, people's rights were constantly defeated by saying that it had taken its origin at some period later than that, and all that was intended by this Act was to substitute the shorter period. Now this claim is not attempted to be defeated by saying that it was first enjoyed at a period since the time of prescription. The objection to the prescription here is that really the evidence is only evidence of occupancy and nothing else, and that it does not constitute evidence of prescription.

Therefore, in my opinion, that Act does not apply, and I think that the judgment of the Chancellor is correct and that it should be affirmed. But before I part with the case I would say, first, as to the matter of costs, I do not think it is an unreasonable effort on Mr. Crisp's part to have endeavoured to sustain this right, which was a quasi right, and one with an enjoyment which those who had gone before him had possessed. I do not think it is unreasonable that he should have litigated his right to appeal; therefore I do not wish to condemn him in costs. But I think, also, I ought to express the opinion that the churchwardens ought to give Mr. Crisp three or four sittings, whatever is the number, as near as may be, in the part of the church where the pew has been in which he was accustomed to sit; and I would call particular attention again to what Sir John Nicholl says about the displacing of people: "A possessory right is not good against the churchwardens and Ordinary,—they may displace and make new arrangements, but they ought not without cause to displace persons in possession": *Pettman* v. *Bridger*. (1) I do think that the possession is one which reasonably entitles Mr. Crisp, in the

(1) 1 Phillim. Eccl. 316.

discretion of the churchwardens and the Ordinary, to have four seats (I think that is the number) allotted to him in as nearly as possible the same part of the church. 1876

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The judgment will be affirmed, except as to costs. No legal right is made out as to the vault. No faculty was granted, and therefore there is nothing on which to rest the claim to the vault. The cause is to be remitted to the Court at Ely.

Judgment affirmed.

Proctors for appellant: *Moore & Currey.*
Proctor for respondents: *Brooks.*

[IN THE COURT OF APPEAL.] *Dec.* 20.

THE VIVAR. (O. 443.)

Practice—Jurisdiction—Admiralty Action in personam—The Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 18—*Rules of Supreme Court, Order XI., Rule* 1 *Appearance under Protest.*

A collision took place at sea, about ten miles from the South Stack Light House, between an American and a Spanish vessel. Both vessels sunk in consequence of the collision, and the owners of the American vessel applied in the registry for leave to issue a writ for service out of the jurisdiction in an action to recover compensation for the loss of their vessel, against a British subject resident in Spain, who was alleged to be one of the owners of the Spanish vessel. The Registrar having granted the necessary leave, the writ was issued and service was effected on the defendant in Spain. Thereupon an appearance under protest was entered on his behalf. Afterwards, on these facts being brought before the judge of the Admiralty Court, on motion, the Court ordered the action to be dismissed:—

Held, on appeal, that the order was right.

A defendant in an Admiralty action desiring to object to the jurisdiction of the Court, may enter an appearance under protest, in accordance with the practice in force in the High Court of Admiralty before the coming into operation of the Judicature Acts.

In re Smith (1 P. D. 300) followed. (1)

ON the 23rd of October in last year, Messrs. Stokes, Saunders, & Stokes, on behalf of the owners of the American ship *Sonora*, applied in the Registry of the Admiralty Division for leave that a

(1) See *Harris* v. *Hamburg-Amerikanische Packetfahrt-Actien-Gesellschaft*, C. P. D., Jan. 13, 1877, not yet reported.

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writ for service out of the jurisdiction should issue in an intended action of damage against Mr. John MacAndrew, of Seville, in Spain.

In support of the application, an affidavit was filed, which, inter alia, stated, that on the 3rd of September last the *Sonora* was in St. George's Channel, about ten miles N.E. by E. ½ E. of the South Stack light, Holyhead, in tow of a tug proceeding to Liverpool, when the steamer *Vivar*, registered as a Spanish vessel, but owned, as was believed, by John MacAndrew, ran into and sunk her; that the *Vivar* also sunk in consequence of the collision; and that the said John MacAndrew was an English subject resident at Seville, in Spain.

The Registrar granted the application, and directed the defendant to enter an appearance in the action within fourteen days from the service of the writ of summons. The notice was served on the defendant at Seville, and on or about the 15th of November his solicitors sent to the plaintiff's solicitors a letter, in substance as follows:—

Nov. 14.

The notice dated the 23rd of October last, which you have caused to be served on Mr. John MacAndrew, has been handed to us with instructions to act on his behalf.

The *Vivar* was a Spanish vessel, Spanish owned. Mr. John MacAndrew is a British subject and resides in England. By the law of Spain a foreigner cannot own a Spanish vessel or shares in a Spanish vessel. Mr. MacAndrew was not owner and could not be owner of the *Vivar*, or of any share in her. Under these circumstances, we presume you will withdraw the notice you have given, otherwise we are quite prepared to appear to the action, and in that case shall, of course, ask for costs. You may consider this as an undertaking on our part on behalf of Mr. MacAndrew. Be good enough to let us hear from you at once.

Subsequently an appearance under protest was entered on behalf of Mr. John MacAndrew, and his solicitors took out a summons calling on the plaintiffs to shew cause why the action should not be dismissed with costs.

Dec. 6. The summons came on to be heard before the judge of the Court of Admiralty.

In an affidavit filed on behalf of the defendant, it was stated, inter alia, as follows: The vessel *Vivar* was a Spanish vessel, belonging to the port of Seville, and prior to and at the time of the collision was the property of and owned by the Spanish Joint

Stock Company, known as Miguel Saenz & Co. The collision occurred on the high seas. 1876 THE VIVAR.

R. E. Webster, on behalf of the defendant, in support of the summons. The action must be dismissed for want of jurisdiction. The Court has already decided that Order XI., Rule 1, of the Rules of Court in the 1st schedule annexed to the Judicature Act, 1875, allowing service out of the jurisdiction in certain cases, does not apply where a collision has occurred without the limits of the territorial jurisdiction of the Court, and the property is not found within those limits: *In re Smith.* (1) The mere de facto service of the writ on the defendant abroad cannot give the Court jurisdiction: *The Evangelistria.* (2) The former practice of the High Court of Admiralty with regard to proceedings on protest not being expressly varied by any of the Rules in the 1st schedule annexed to the Judicature Act, 1875, the right of a defendant in an Admiralty action to appear under protest is still preserved (38 & 39 Vict. c. 77, s. 18; Admiralty Court Rules, 1859, rule 37), and in fact has been recognised by the Court since the coming into operation of that Act: *The Catterina Chiazzare* (3); *The Evangelistria.* (2)

W. G. F. Phillimore, on behalf of the plaintiffs. It must be admitted that the Registrar has erred in allowing the writ to issue for service out of the jurisdiction. The defendant, however, if he objected to the Court entertaining the action, ought, without entering an appearance, to have moved to set the service aside: *Diamond* v. *Sutton* (4); *Westman* v. *Aktiebolaget Ekmans Mekaniska Snickarefabrik.* (5) Not having done so, but having appeared, he is now estopped from denying the jurisdiction: *Staniforth* v. *Richmond.* (6) It is clear from the orders and rules in the first schedule of the Judicature Act, 1875, as to the mode and manner of entering an appearance (see Order XII., Rules 1—17, and Appendix A., No. 6) that the legislature contemplated that no appearance except what was known in the Admiralty Court as an absolute appearance should be henceforth used in any Division of the High Court. In

(1) 1 P. D. 300.
(2) 25 W. R. 255
(3) 1 P. D. 368.
(4) Law Rep. 1 Ex. 130.
(5) 1 Ex. D. 237.
(6) 13 W. R. 724.

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Webster, in reply.

SIR ROBERT PHILLIMORE. I am asked in this case to dismiss the action, the writ having been improperly issued. It is admitted, that if the defendant is not estopped from raising the question of jurisdiction, the Court has no jurisdiction, unless the decisions of this Court in *In re Smith* (1), and *The Evangelistria* (2), are wrong. Now, I am not satisfied that the decisions of the Court in those cases are wrong. I must abide by those decisions until they are overruled elsewhere; and in consequence I must dismiss the action.

From the order made in pursuance of this judgment the owners of the *Sonora* appealed. (3)

On the appeal being opened,

R. E. Webster, for the respondent, Mr. MacAndrew, took the preliminary objection that there was no appeal from the order without special leave, which had not been obtained. The order made by the judge was really an appeal from an order in chambers under Order LIV., and having been reviewed by the judge it could not be the subject of a second appeal without special leave. [He referred to the Judicature Act, 1873, s. 50.]

[JAMES, L.J., said that the section referred to did not apply to a case like the present, where the question had been heard in the first instance before a judge in court.

BAGGALLAY and BRAMWELL, JJ.A., concurred.]

(1) 1 P. D. 300.

(2) 25 W. R. 255.

(3) The order was in terms as follows:—The judge having heard counsel on both sides, dismissed the defendant, John MacAndrew, from all further observance of justice therein.

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W. G. F. Phillimore, and *Stubbs*, for the appellants. The defendant has mistaken the course which ought to be pursued. He has entered an appearance under protest according to the old practice, which is now abolished by the Judicature Act, instead of simply moving to have the service of the writ set aside. There is now no distinction in the practice of service out of the jurisdiction between any of the Divisions of the High Court of Justice: *Westman* v. *Aktiebolaget Ekmans Mekaniska Snickarefabrik.* (1) The consequence is that his appearance under protest operates as an ordinary appearance, and he is estopped from disputing the jurisdiction of the Court: *Staniforth* v. *Richmond.* (2) Besides, the defendant by his solicitor agreed to enter a common appearance, for that was the effect of the solicitor's letter of the 14th of November, 1876: Rules of Court, Order IX., Rule 1. We might on that letter have moved that the solicitor be attached for not entering an appearance, or we might have proceeded to sign judgment without further leave of the Court: *Scott* v. *Royal Wax Candle Company.* (3)

R. E. Webster, for the respondent. The practice in the Admiralty Court has always been to enter an appearance under protest, and then to move to dismiss the action, or enter into pleading under protest. This practice has not been abolished by the Judicature Acts, for by the 18th section of the Judicature Acts, 1875 (38 & 39 Vict. c. 77), the practice in the Admiralty Court, unless where expressly varied, is carefully preserved; and the same practice has been acted upon since; for instance, in the case of *The Catterina Chiazzare.* (4)

Phillimore, in reply.

JAMES, L.J. The real point which was raised in the Court below, and the real point raised before us, is whether the defendant was estopped by what had taken place from objecting to the validity of the order for service abroad. I am of opinion that he is not estopped. The fact of the solicitors for the defendant writing the letter undertaking to appear, in ignorance of the fact that there might be disclosed a perfectly good objection on the ground of

(1) 1 Ex. D. 237.
(2) 13 W. R. 724.
(3) 1 Q. B. D. 404.
(4) 1 P. D. 368.

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the cause of action having taken place out of the jurisdiction, did not bind the defendant. I am also of opinion that an appearance under protest is not an idle form, but that it is the old form known to the Court of Admiralty, and is not expressly taken away by the rules under the Judicature Act. The solicitors for the defendant appeared under protest, and moved the Court to dismiss the action, for the real purpose of raising the question whether the defendant was properly cited and subject to the jurisdiction of the Court by the procedure which had taken place there, in other words, whether he was properly compellable to appear. The opinion of the learned judge of the Admiralty Court was that he was not properly compellable to appear, and he dismissed the action. I am of opinion that the learned judge was right. The appeal must be dismissed with costs.

BAGGALLAY and BRAMWELL, JJ.A., concurred.

Solicitors for owners of the *Sonora*: *Stokes, Saunders, & Stokes.*
Solicitors for Mr. MacAndrew: *Clarkson, Son, & Greenwell.*

Nov. 24.

THE PLADDA. (F. 27.)

Damage—Collision between Vessel moored and Vessel driven from her Moorings by third Vessel—Duty of Vessel lying at Moorings during a Gale to have Chains bent and Look-out on Deck.

During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to mooring buoys placed there by the harbour authorities. On the brig striking the steamer the ring of one of the buoys carried away, and the steamer got adrift, and drove down the river, and ultimately came in contact with and did damage to a barque, whose owners instituted a cause of damage against the steamer in the county court of Northumberland, to recover for the damage done to their vessel by the steamer.

At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, and that no look-out had previously been kept on deck, though it was known that the weather was getting worse:—

Held, on appeal, affirming the decision of the Court below, that a defence of inevitable accident, set up by the owners of the steamer, was not sustained, and that the steamer was alone to blame for the collision.

THIS was an appeal from the county court of Northumberland, holden at Newcastle-upon-Tyne, in a cause of damage instituted

on behalf of the owners of the barque *Ocean* against the steamer *Pladda*, to recover damages in respect of a collision between the two vessels in the Tyne, on the 20th of January, 1875, during a very violent gale, when the *Pladda*, which had been lying off Wellington Quay, moored to buoys placed there by the Tyne commissioners, having been run into by a brig adrift in the river, got adrift from her moorings, owing to the ring of one of the buoys having carried away, and came into collision with and damaged the barque *Ocean*, as that vessel was lying on the ground alongside Young's Dock Quay. The result of the evidence and the nature of the decree appealed from appears from the judgment of this Court, and the judgment of the learned judge of the Court below (Thomas Bradshaw, Esq.), delivered by him on the 17th of December, 1875, in the following terms:—

THOMAS BRADSHAW, ESQ. The question to be decided in this case—which undoubtedly on the face of it presents itself as a case of inevitable accident—is whether there are any circumstances shewing negligence on the part of the master of the *Pladda* or any of his officers which would prevent the conclusion of inevitable accident from being arrived at. We have it in evidence that the *Pladda* was lying off Clelland's Yard in the Tyne, moored between the *Fusilier* and the *Hugh Taylor*, in a proper way and with all due precautions, to the River Tyne commissioners' buoys—and, so far as the *Pladda* was concerned, she was lying there with the intention of going on to Clelland's slipway for some repairs, and it is in evidence that she would have been taken on the slipway the day before the collision happened, but that she was not sufficiently light forward by two or three inches. She had in the meantime been lightened by removing everything that could be removed, even to her cables, to the after part of the ship, and her position was such at that time that if the wind had not increased during the night of the 20th Mr. Clelland would have taken her on to the slipway that night at one o'clock. Mr. Clelland's foreman said in evidence, "I intended taking her on to the slip at one o'clock that night if there had not been a gale." The vessel thus being moored and waiting for her summons to go on to the slipway, the captain and all the crew went below. I believe they went below at ten o'clock. We know nothing of what happened from that hour till twelve o'clock. At twelve o'clock the mate came on deck, and on looking about and finding nothing to make him apprehensive about any mischief to the ship from the state of things that he saw, he went below again. There was no anchor watch, and nothing turns on this, because the ship was moored in the river and not anchored. There was no watchman on deck, and I think something will turn upon this. About three o'clock the mate came up again, and found that the wind was blowing then nearly a hurricane, and about the same time, on hearing voices on deck, as he tells us, the captain came on deck. All the hands were then ordered on deck. It was endeavoured to get out a rope to the *Hugh Taylor* as a means of precaution. It was at this time that a brig was seen drifting or driving down upon the tier in which the

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Pladda, *Hugh Taylor*, and the *Fusilier* lay, and this vessel did then, in fact, drive into them with such violence that, with the force of the blow, aggravated probably by the violence of the wind at that time, the moorings of all those vessels broke, and they were carried away. There was then an endeavour to get out a cable and bend it on to the anchor—the cable as we have seen had been carried aft—but the cable fouled. Being thus adrift from her moorings in the river, with the gale as described, the *Pladda*, after various vicissitudes, was driven into the barque *Ocean*, and did the damage complained of in this action, which is to be assessed by the consent of both parties at 300*l*. The question for me is, ought I, under these circumstances, to say that the owners of the *Pladda* are liable for this injury? The true rule of law is laid down by the Privy Council in *The William Lindsay* (1), and it is shortly this: that the master "must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avoid danger in the circumstances in which he may happen to be placed." Now, looking to the position of this ship, to the circumstances which surrounded her, to the object she had in view of being taken on to the slipway, did she do that which was reasonable for her to do at that time? Did her captain and officers do that which they ought to have done? If I were left to my own unaided judgment, I should be inclined to say that the captain and officers had sufficiently and substantially done their duty in the circumstances in which they were placed. But I was pressed very much by some observations which were made by the judge of the High Court of Admiralty in the recent case of *The Kepler* (2), and it is a curious fact that the circumstances connected with the injury deposed to in that suit happened on the Tyne on this very night of the 20th of January, 1875. There are two things which have been pressed very much upon me as bearing upon negligence, and one is that there was no watchman. I have already said that I do not think an anchor watch was necessary, as the ship was moored in harbour. I think that, up to twelve o'clock, when the mate came on deck, everything was done that was necessary to be done under the circumstances, and that up to that time there was no negligence whatever. I think the negligence began then, and I think there was negligence on the part of the mate at that time. The gale was then rising, although it had not arrived at the hurricane. The hurricane arrived at three o'clock, and the mate ought, in my opinion, if he had thought fit to go down into his cabin again, to have set a watch on deck to have aroused him, and perhaps the captain, the moment any change occurred, and if in any case it might become necessary to take further steps; or he should have at once gone and called the captain, and asked, "What do you think of it? there is a gale rising, and you can see what the state of the barometer is?" And now I come to the opinion of Sir Robert Phillimore pronounced in the case to which I have adverted, to which it is my plain duty to defer. "In the first place," he says, "they"—the Elder Brethren of the Trinity House—"are of opinion that this vessel—the *Kepler*—was not properly moored." I cannot say that here, for I think the *Pladda* was properly moored, "and certainly she ought to have retained the means of letting go her anchor and have had a chain ready to veer." I think these words are applicable to this case. The *Pladda* should have had her cable attached to her anchor, so as to be able to

(1) Law Rep. 5 P. C. 338. (2) See note at end of case, p. 40.

let it go when an emergency arose. Sir Robert Phillimore further says: "There was warning from the falling of the barometer and the gale of the day before." And the only observation I make upon that is that, in reply to a question, the captain said he did not look at the barometer although the wind was rising. I am therefore bound to find that there was a want of that ordinary foresight and prudence which was required under the circumstances, and I pronounce that the *Pladda* is alone to blame. My judgment is for the plaintiffs. The *Ocean* will take its 300*l.*, the amount of the damage agreed upon. I think it proper to add that the assessor who has sat with me entirely concurs in my judgment.

Against the decree made in pursuance of this judgment the owners of the *Pladda* appealed to this Court.

The appeal came on to be heard before the judge, assisted by two of the Elder Brethren of the Trinity corporation.

Butt, Q.C., and *G. Bruce*, appeared on behalf of the appellants. The real question is not whether the collision with the *Ocean* could, by any possibility, have been avoided, but whether the master of the *Pladda*, previously to the accident, did not exercise all the care, skill, and diligence, which could have been expected from a reasonable man: *The William Lindsay* (1); *The Marpesia*. (2) The case of *The Kepler* (3) is not in point, as in that case the *Kepler* was held to be improperly moored, whilst here the moorings were amply sufficient. The circumstances in the present case are more similar to those in the case of *The Ambassador* (4), where a plea of inevitable accident was sustained in favour of a vessel driven from her moorings in the Thames, although no attempt to anchor had been made. The master of the *Pladda* was not bound to take precautions against a gale of extraordinary severity, or against an accident entirely caused by another vessel's default. It was necessary that the *Pladda* should go on to the slipway, and this could not be done unless she was lightened forward and her chains had been unbent from her anchors.

E. C. Clarkson appeared on behalf of the respondents. The proper precautions required in the circumstances were not taken on board the *Pladda*. It was apparent that the weather was getting worse, and the master of the *Pladda* ought to have seen

(1) Law Rep. 5 P. C. 338.
(2) Law Rep. 4 P. C. 212.
(3) See note at end of case, p. 40.
(4) Admiralty Court, Feb. 12, 1875, not reported.

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that a look-out was kept on deck, and that the chains of the anchors were re-bent, so as to be available when the *Pladda* got adrift. The collision in the case of *The Ambassador* (1) took place in calm weather, when it was contrary to expectation that any accident could happen.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. This is an appeal from the decision of the judge of the county court of Northumberland, holden at Newcastle, he being assisted by a nautical assessor. By their decision the *Pladda* was found to blame for this collision.

The *Pladda* was a vessel which, on the 20th of January, 1875, was moored properly at a proper mooring-place in the river Tyne, and had been waiting some time to get on a slip for the purpose of being repaired; and those who had command of her thought it necessary, in order to her doing so, to cause the chains of her anchors to be brought aft, the anchors being left on the fore part of the vessel. The *Pladda*, being so moored, was run into by a brig whose name does not appear, but which seems to have dashed against the whole tier of vessels on each side of the *Pladda* and set them all adrift, and the *Pladda*, after traversing a certain space, and after the lapse of a certain time, was driven into collision with the *Ocean*, whose owners are the respondents in this case and were the plaintiffs in the Court below. Now, I have carefully considered the case and the law applicable to it, which is laid down by Dr. Lushington in *The Virgil* (2), cited in *The Marpesia*. (3) In the former case Dr. Lushington said:—

> In my apprehension an inevitable accident in point of law is this, namely, that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution, that would have rendered the accident less probable.

Not that would have prevented the accident occuring if it of necessity must have occurred, but that would have rendered it

(1) Admiralty Court, Feb. 12, 1875, not reported.

(2) 2 W. Rob. 201.

(3) Law Rep. 4 P. C. 212.

"less probable." In the present case the judge of the court below held the *Pladda* to blame on the facts which I will shortly state. It appears that the *Pladda* being moored in the way which I have described before she got adrift as I have stated, had no anchor watch on board; but at midnight the mate came on deck, or looked upon the deck, and saw that the weather was becoming worse. I will read it in his own words: he says, "I was only out once before midnight. It blew pretty strong then." He is asked whether he thought there was anything to make him fear the *Pladda* would not remain at her moorings, and he said, "Well, not at that time; I don't think at that time." It is indisputable that he saw a change in the weather had taken place; he knew that the cables had been unchained from the anchors and were unavailable, nevertheless, he thought it his duty to go below without summoning the master, or consulting the other officers, or setting any watch or seamen to look out, notwithstanding that he saw that the weather was getting worse, in the event of other precautions being necessary. He comes up at three o'clock, and then he finds it necessary to give orders to put out another rope as well as to get a chain bent to one of the anchors. I have consulted the Elder Brethren of the Trinity House on the different questions involved, and I have told them the law with respect to the amount of care, caution, and skill that is required, in order to establish the defence of inevitable accident, and I will state the conclusion at which we have arrived. First, we are of opinion that originally the chains were improperly unbent, and that the weight of that part of the cable attached to the anchor would have made no perceptible difference with respect to getting the vessel on the slipway; secondly, we are of opinion that, knowing the state of the weather, the cables should have been re-bent; thirdly, that when the mate was on deck he was very much to blame for not reporting the weather and causing a look-out to be kept on deck; and, fourthly, we are of opinion that, had an anchor been let go, the collision would probably have been averted, at all events, the master would have done all that was possible in the circumstances, and have rendered the accident, to use the words of Dr. Lushington, "less probable."

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On these grounds I decide that the judgment of the Court below should be affirmed, and I dismiss the respondents with costs.

Solicitor for appellants: *Cooper.*

Solicitors for respondents: *Stokes, Saunders, & Stokes.*

[IN THE COURT OF ADMIRALTY.]

1875

July 22.

THE KEPLER. (7182.)

THIS was a cause of damage instituted on the behalf of the owners of the brig *Carbonaria* against the steamship *Kepler*, and against her owners, and their bail intervening as defendants.

The petition alleged that early on the morning of the 20th of January, 1875, the *Carbonaria*, when securely moored to the buoys off Pott's Wharf, in the river Tyne, was run into by the *Kepler*, which, before and at the time of the collision, had neither her master nor any of her crew on board her; that the *Kepler* had been improperly left without any responsible person on board her, contrary to the bye-laws of the river Tyne; and that she had been improperly and insecurely moored.

The answer set up the defence of inevitable accident, alleging that the *Kepler* had been securely moored, that her moorings had parted from the violence of the gale, that a watchman, a fireman, and her steward had been on board her when she had broken adrift; but the fireman had, in endeavouring to make a rope fast to another vessel, been left on board such other vessel, whilst the watchman and steward, after endeavouring to let go an anchor, had jumped on board a vessel to save their lives.

The cause now came on for hearing, before the judge, assisted by two of the Elder Brethren of the Trinity Corporation.

Butt, Q.C., and *H. Stokes*, for the plaintiffs.

Milward, Q.C., and *E. C. Clarkson*, for the defendants.

The result of the evidence appears from the judgment.

SIR ROBERT PHILLIMORE. In this case the *Carbonaria* was properly and securely moored off Pott's Wharf in the river Tyne, and on the 20th of January in this year, there blew a considerable gale; one of the consequences of which was that a vessel called the *Kepler*, an iron screw steamship, drove down athwart the bows of the *Carbonaria*, and did her considerable damage. The owners of the *Carbonaria* bring their action in this Court against the *Kepler*, and the only defence set up by the *Kepler* is, that the collision was occasioned by inevitable accident. It is the duty of those who set up the defence to sustain it by adequate evidence; and after listening to all the testimony which has been produced before us, we are of opinion that the defence is not adequately made out. It is a case in which, no doubt, my own judgment has been greatly strengthened by the

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opinion of the Elder Brethren of the Trinity House, because it involves, to a great extent at least, if not entirely, matters upon which their skill and experience peculiarly qualify them to decide. In the first place, they are of opinion that this vessel, the *Kepler*, was not properly moored, and certainly she ought to have retained the means of letting go her anchor, and have had a chain ready to veer. There was warning from the falling of the barometer and the gale of the day before; and the place in which she was anchored was such as to require every precaution. We are, moreover, of opinion that the master ought to have been on board himself, and not on shore, and more of the crew ought to have been on board, in order to enable them to take every precaution necessary, if they found that the anchor might have been dropped and other measures taken. And it appears that, though a vessel was in juxtaposition to her, she would, if she had been properly moored, have lain in perfect security from being driven from her moorings by the other vessel driving up. On the whole, we are of opinion that the evidence does not establish that the collision was entirely the result of inevitable accident, but that it was occasioned in a great measure by negligence on the part of the master and crew of the *Kepler*. I therefore pronounce the *Kepler* alone to blame.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitor for defendants: *Cooper.*

THE ROSARIO. (B. 341.)

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Dec. 5.

Distribution of Salvage—Assignment of Shares of Salvage-money previously earned—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 18.

A cause of distribution of salvage was instituted on behalf of some of the crew of a steamship against the owners of the steamship. The owners of the steamship appeared to defend the suit, and in their statement of defence, alleged in effect that, subsequently to the salvage services, but before any amount had been paid in respect of such services, fourteen of the plaintiffs had by deed, in consideration of sums varying from 1*l.* to 10*s.* paid them by the defendants, assigned to the defendants all their respective shares of salvage reward. The plaintiffs demurred to the paragraphs of the statement of defence containing these allegations.

The Court sustained the demurrer.

THIS was a cause of distribution of salvage instituted on behalf of sixteen of the crew of the steamship *Navarino* against Thomas Wilson, Sons, & Co., the owners of the said steamship.

The statement of claim alleged that the *Navarino*, on the morning of the 22nd of March, 1875, when on a voyage from Glasgow to Bombay, and manned with a crew of sixty-two hands, including

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the plaintiffs, had rendered salvage services to the steamship *Rosario*, by towing her in a state of distress the distance of eighty-six miles into the port of Gibraltar. That for the services so rendered the owners of the *Rosario* and her cargo had paid to the defendants the sum of 750*l.*, which amount had been accepted by the defendants; but the defendants, though requested to do so, had refused to pay the plaintiffs their equitable portion of the said sum.

The solicitors for the defendants delivered a statement of defence, which, after admitting that the *Navarino* had towed the *Rosario* to Gibraltar, as mentioned in the statement of claim, and alleging that the service had been rendered without any danger to the plaintiffs and mainly by the steam-power of the *Navarino*, further alleged, in the 4th paragraph, substantially as follows:—

4. The crew of the *Navarino* having made frequent applications to the defendants for the payment of their shares of the salvage in respect of the said services, and constantly importuning the defendants in respect thereof, although the defendants had not received any amount in respect of such salvage, and had not agreed with the owners of the *Rosario* as to the amount to be received, the defendants determined to purchase their respective shares of the salvage from such of the crew as wished for an immediate payment, and accordingly, by an indenture dated the 11th day of June, 1875, between the several persons whose names are thereunto described, and seals are affixed, of the one part, and the defendants, of the other part, the said several persons parties thereto, of the first part, including all the plaintiffs, except George Short and Robert Burns, in consideration of the respective sums set opposite to their respective names in the fourth column of the schedule, paid by the defendants to the said parties of the first part, each of the said parties of the first part assigned to the defendants all and every the share, right, title, and interest of the said parties of the first part in the salvage or salvage reward and remuneration then due, or thereafter to be due or paid or awarded in respect of the salvage services set forth in the statement of claim, with power for the defendants to sue for, receive, and give receipts for the salvage, and to use the names of the said parties of the first part.

5. The sums so paid to the said plaintiffs other than George Short and Robert Burns (1) were as follows:—

[Here followed a schedule of the names of all the plaintiffs in question: there being printed opposite each name the sum paid in each case under the provisions of the agreement referred to in the preceding paragraph. The amount of the sum so printed was either 1*l.* or 10*s.*]

3. The plaintiffs demurred to the 4th and 5th paragraphs of the statement of defence, and alleged as the ground of the demurrer

(1) In a subsequent paragraph of the statement of defence a tender to each of these two plaintiffs of the sum of 4*l.* was pleaded.

that the agreement therein set out was void and inoperative under the provisions of the Merchant Shipping Act, 1854.

Nov. 30. *J. P. Aspinall*, on behalf of the plaintiffs, in support of the demurrer. The agreement referred to is not only an agreement which, under the old law, would have been set aside as inequitable at the hearing, but is now absolutely void under the express provisions of the 182nd section of the Merchant Shipping Act, 1854. It is clear, not only from the very words of that section but from the light thrown on its construction by a consideration of the 18th section of the Merchant Shipping Amendment Act, 1862, that the legislature intended to prohibit the assignment not only of salvage about to be earned, but of salvage already earned.

E. C. Clarkson, on behalf of the defendants. The 182nd section of the Merchant Shipping Act, 1854, is directed against the abandonment of a right to salvage remuneration for services to be performed at a future period, and not against an assignment for valuable consideration of a right to share the salvage reward due in respect of services, already performed, and the character of which is known to the salvors. The question whether the consideration expressed in the assignment is adequate or inadequate can only be determined by the Court when all the circumstances of the case are before it at the hearing. All other choses in action can be assigned. Why should a right to recover salvage be alone excepted?

Cur. adv. vult.

Dec. 5. SIR ROBERT PHILLIMORE. This is a cause of distribution of salvage, in the course of which a question on demurrer has arisen. The plaintiffs are sixteen of the crew, and the defendants the owners of the salving vessel. In the 4th paragraph of the statement of defence it is stated as follows:—[His lordship here read the 4th paragraph of the statement of defence as above set out]. Then the next paragraph sets out the names of the crew, and the sums, opposite to their names, which they have received by way of purchase for the assignment of their right to salvage. The sums vary from 1*l.* to 10*s.* Now, these two paragraphs have been demurred to on the ground that the agreement mentioned in the 4th paragraph of the statement of defence is wholly void and inoperative

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under the 182nd section of the Merchant Shipping Act, 1854, and that the plaintiffs have not abandoned any right to recover from the defendants their due, equitable, and reasonable proportion of salvage reward. This demurrer has been argued before the Court, and well argued on both sides. The question for the Court to decide is whether, under the statute referred to, this assignment of the right to share in salvage was or was not valid. The words of the Merchant Shipping Act of 1854, s. 182, are as follows: "... Every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative." It is contended that this section is not applicable to the present case, or to this deed of assignment, because it is said, and has been argued, that it is not a stipulation by which the parties consented to abandon any future rights they might have in the nature of salvage, but merely an assignment for a valuable consideration; but in construing the act I must look not only to the words but to the general purpose of the Act, which is well stated in *The Pride of Canada* (1) by Dr. Lushington, in the 1st Maritime Law Cases, where he says:—

> The ancient law of the Court in questions of this kind was undoubted,—viz. that whenever any sum had been allotted by way of salvage, it was competent to any party dissatisfied with the distribution by the owners or master to apply to this Court for an apportionment of that sum of money; and so jealous was the law that no man should be deprived of his fair share of this reward, that even before the passing of the Act of Parliament ... it was a general doctrine of this court that no seaman could enter into a stipulation of an inequitable nature; and giving up his salvage would so have been deemed according to all the authorities and principles laid down by Lord Stowell and every other judge, upon the subject ...

My learned predecessor then proceeds to advert to the subsequent statute, the Merchant Shipping Amendment Act of 1862 (25 & 26 Vict. c. 63), s. 18. It is not necessary that I should consider the force of that section, for it is clearly inapplicable to the present case, being applicable only to salvors who have gone on board ships on terms of agreement to be employed for salvage service. It is, however, not altogether without bearing upon the case to refer to 27 & 28 Vict. c. 24, s. 15, by which under the

(1) Br. & Lush. Adm. 203; 1 Mar. Law Cases, 406.

heading "distribution of salvage, bounty, prize, and other money," it is enacted that,

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Any assignment, sale, or contract of or relating to any such money as aforesaid, payable in respect of the services of any petty officer or seaman, non-commissioned officer of marines, or marine, other than such as may be made or entered into under the authority of and in conformity with any such order in council, shall be void.

The legislature, in the 182nd section of the Merchant Shipping Act, 1854, to which I have already adverted, and which, in my opinion, is applicable to the present case, could not have intended to provide merely against the abandonment, without any valuable consideration whatever, of a right to share in salvage; but it must have intended, looking to the general purpose of the Act, to protect seamen in the assignment of their rights before and after salvage service had been rendered. The section of the statute is in aid of the general law, and not as a substitute for it. I think the demurrer must be sustained, and that the plaintiffs are entitled to costs. I grant leave to amend.

Solicitor for plaintiffs: *Coote.*

Solicitors for defendants: *Pritchard & Sons.*

THE GLANNIBANTA. (E. 333.)

ELEMORE *v.* TRIM.

Dec. 13.

Distribution of Salvage—Jurisdiction—County Court Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *subs.* 1—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 498.

A county court, having Admiralty jurisdiction, has jurisdiction to entertain a suit of distribution of salvage where the amount which the Court is asked to apportion does not exceed 300*l.*, notwithstanding that the value of the property saved exceeds 1000*l.*

THIS was an appeal from the decision of the county court of Durham, holden at Sunderland, in a suit of distribution of salvage, instituted on behalf of William Elemore and Thomas Donkin, two of the crew of the steam-tug *Scottish Maid*, against the owners of the steamer *Glannibanta*.

On the 22nd of June last the action came on for hearing at

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Sunderland, and the learned judge of the county court (Edgar J. Meynell, Esq.) having heard the solicitors for the plaintiffs and the defendant, dismissed the action.

On the 30th of June, W. G. F. Phillimore, on behalf of the appellants, the plaintiffs in the court below, applied to the judge of the High Court of Admiralty, by motion ex parte, under the provisions of the 6th section of the County Courts Act, 1875 (38 & 39 Vict. c. 50), for an order calling upon the defendants, the owners of the *Glannibanta*, to shew cause why an appeal should not be allowed to the proper court to which an appeal lay, and why the decision of the county court should not be reversed.

His lordship granted the application, and the following order was subsequently drawn up in the registry:—"The judge having heard counsel for the appellants, directed that the appeal should be proceeded with."

Dec. 13. The appeal now came on to be argued.

It appeared by an affidavit filed in the course of the proceedings, that the learned judge of the court below had dismissed the action for want of jurisdiction. Copies of the summons issued out of the registry of the court below, and of a document styled a petition, were annexed as exhibits to this affidavit. Such copies, so far as material, were in substance as follows:—

Summons.

Whereas an action for a fair and equitable distribution of the sum of 250*l.*, received by the defendant, Robert Trim, on behalf of the masters, owners, and crew of the steam-tug *Scottish Maid*, from the owners of the screw steamer, *Glannibanta*, for salvage services rendered by the said steam-tug and her crew, of whom the plaintiffs formed part, to the said steamship at Sunderland aforesaid, on the 19th day of December, 1875, has been instituted in this Court on behalf of the plaintiffs against you, according to the petition hereunto annexed, of Henry Dixon, solicitor to the said plaintiffs:

You are hereby summoned to enter an appearance in the said action within four clear days of the service hereof. You are also warned that if you do not enter an appearance as aforesaid, the judge of this Court will proceed to hear and determine the said action, or to make such orders therein as to him shall seem fit.

Dated and sealed this 29th day of April, 1876.

To the defendants. Robert K. A. Ellis, Registrar of the Court.

Petition.

1. The plaintiff, William Elemore, is a duly licensed pilot of the port of

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Sunderland, and the plaintiff, Thomas Donkin, is a waterman, and was a master of a steam-tug of the same port.

2. The plaintiffs, on the 19th day of December, 1875, between the hours of 1 and 2 p.m., observed the screw steamer *Glannibanta*, of the port of Newcastle, of 534 tons register, making towards Sunderland Harbour. The state of the tide was then about four hours ebb, a sea of from three to four feet was rolling over the bar, and it was blowing a stiff breeze. The plaintiffs watched the progress of the steamer as she approached the harbour, knowing that any attempt on its part to take the harbour at that time of the tide, and with such sea, was fraught with great danger. When the steamer reached the bar, she struck, and ultimately went behind the North Pier.

3. The plaintiffs immediately ran up the quay for the purpose of obtaining assistance, and observing the defendant's steam-tug, *Scottish Maid*, lying at the Commissioners Ballast Wharf, which is close to the harbour mouth, they went on board and found that all of her crew were on shore except a youth named Richard Trim, a son of the defendant Robert Trim, to whom they related the circumstances, and requested him to go immediately for his father, and tell him to come at once, and that in the meantime they would get the steam up and prepare the steam-tug for starting.

4. The plaintiffs, with the assistance of a man who came on board afterwards, did prepare the steam-tug for starting by getting up steam and making her otherwise ready for sea.

5. Shortly afterwards the engineer of the said tug and the said Richard Trim, both sons of the said defendant Robert Trim the elder, came on board.

6. The said Robert Trim, the younger, asked the plaintiff Thomas Donkin to take the command of the said steam-tug, which he did, the said plaintiff William Elemore, and Richard Trim, and one Brown forming the crew; with the said Robert Trim, the younger, acting as the engineman.

7. The said steam-tug was accordingly taken to the scene of the disaster, the *Glannibanta* being then behind the north pier and in great danger, with the steam-tug *Victoria* in attendance upon her.

8. The plaintiff Thomas Donkin tendered his services, as master of the said steam-tug, to the captain of the *Glannibanta*, which were accepted, and by the skilful working of the said steam-tugs *Scottish Maid* and *Victoria*, which was attended with great personal risk to those on board the said steam-tugs, hawsers were got out and the said ship successfully towed into the harbour and laid upon the north sands out of danger.

10. The owners of the *Glannibanta* have paid to the defendants the sum of 250*l.* for the services so rendered by the *Scottish Maid*, out of which sum they have paid the plaintiffs the sum of 7*l.* 13*s.* 4*d.* each.

11. The plaintiffs, considering the sum of 7*l.* 13*s.* 4*d.* wholly insufficient, have applied to the said defendants, the owners of the steam-tug *Scottish Maid*, for a more equitable division of the said sum of 250*l.*, but they have refused to pay any greater sum to the plaintiffs.

The solicitor for the plaintiffs therefore prays the honourable the judge of this court to order that an equitable share of the said sum of 250*l.* be paid to the plaintiffs, and to condemn the defendants in the costs of this suit, and that right and justice may be done in the premises.

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G. Bruce, on behalf of the respondents. The respondents, in the first place, contend that the judge in court had, on the 30th of June last, no power to grant the application then made on behalf of the appellants. At that time the 16th Rule of the Rules of the Supreme Court, December, 1875, which was drawn up since the decision of this Court in the *Two Brothers* (1), was in force. The application, therefore, ought to have been made to the Divisional Court referred to in that rule, and only in case that Court was not then sitting, to a judge sitting at chambers. [He referred to *Brown* v. *Shaw*. (2)] Moreover, the provisions of the section under which the application was professedly made were not complied with, for the notes of the judge, from whose decision the appeal is brought, were not used on the motion.

[On the Court intimating that it was not disposed to allow the appeal to be defeated on any technical ground, but was prepared to extend the time for appealing, and to give leave to have the proceedings amended if necessary, the counsel for the respondents agreed to waive the objections he had raised to the mode and manner in which the appeal had been prosecuted, and to the jurisdiction of the Court as the proper appellate Court to decide whether the decision of the judge in the court below, in dismissing the suit for want of jurisdiction, was right. The counsel for the appellants at the same time agreed to admit that the value of the *Glannibanta* exceeded 1000*l*.]

The county court judge was right in dismissing the action for want of jurisdiction. A claim for salvage and a claim for distribution of salvage, are two distinct things, and county courts, having Admiralty jurisdiction, have expressedly, by the words of the statute 31 & 32 Vict. c. 71, s. 3, subs. 1, jurisdiction only over claims for salvage, that is, over causes of salvage proper. By the Merchant Shipping Act, 1854, ss. 466, 498, jurisdiction is given to the receivers of wreck to apportion salvage where the amount to be apportioned does not exceed 200*l*., and to the Courts having Admiralty jurisdiction in every other case. The legislature must be considered to have been aware of the state of the law in this respect when the County Courts Admiralty Jurisdiction Act,

(1) 1 P. D. 52. (2) 1 Ex. D. 425.

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1868, was passed, and to have declined to confer on the county courts a concurrent jurisdiction with either the receivers of wreck or the Court of Admiralty. The words "any court having Admiralty jurisdiction," in the 498th section of the Merchant Shipping Act, 1854, cannot refer to courts other than Courts having Admiralty jurisdiction existing at the passing of that Act. [He referred to *The John Evans* (1) and 25 & 26 Vict. c. 63, s. 49.] If the Court should hold that jurisdiction in causes of distribution of salvage has been given to the county courts, the result will be that the intention of the legislature, that salvage suits in which more than 300*l.* is claimed should be tried in the superior courts, will be frustrated, for although the amount claimed by the plaintiff in an apportionment suit may not exceed 300*l.*, the county court judge, before giving any decision in the suit, must impliedly take into consideration, and virtually apportion, the entire sum received for salvage reward. Moreover, in this case the property salved is more than 1000*l.* in value, and, apart from the question whether the jurisdiction given by 31 & 32 Vict. c. 71, s. 3, does or does not extend to any suits other than suits for salvage properly so called, such jurisdiction is, by the words of the Act, limited to cases where the amount claimed does not exceed 300*l.*, "or" the value of the property saved does not exceed 1000*l.* The word "or" must be read "and."

W. G. F. Phillimore, on behalf of the appellants. The respondents cannot contend that the judge of a county court having Admiralty jurisdiction, who has decided a cause of salvage and awarded a certain sum to the salvors, does not possess jurisdiction to apportion the sum so awarded. Why, then, has he not equally jurisdiction to apportion salvage remuneration, where the sum claimed has been ascertained to be due without the necessity of any litigation? Not only do the words "any claim for salvage," in 31 & 32 Vict. c. 71, s. 3, subs. 1, include any claim for distribution of salvage, but the jurisdiction over such last-mentioned claims has been undoubtedly conferred on the county courts having Admiralty jurisdiction by the 498th section of the Merchant Shipping Act, 1854. It is also plain that the word "or," in the above-mentioned

(1) 43 L. J. (Adm.) 9.

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subsection of the County Courts Admiralty Jurisdiction Act, 1868, must be read as equivalent to "as well as," and that the County Court of Sunderland has jurisdiction in the present case, though the value of the *Glannibanta* exceeds 1000*l.*

Bruce, in reply.

SIR ROBERT PHILLIMORE. The question before the Court in this case is, by the consent of counsel, this: whether a county court, having Admiralty jurisdiction, has that jurisdiction in a cause of distribution of salvage where there has been no original suit for salvage. I am of opinion that it has jurisdiction. I am of this opinion, first of all, on the plain meaning, as it appears to me, of the terms used in the County Court Admiralty Jurisdiction Act, 1868, s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes . . .: 1. As to any claim for salvage—any cause in which the value of property saved does not exceed 1000*l.*, or in which the amount claimed does not exceed 300*l.*" Now, first of all, it is admitted that the words "any claim for salvage" are extremely broad, and taken in their common signification would include a suit for distribution of salvage, which is a kind of claim for salvage. It is admitted also, and could not indeed have been denied, that a county court having Admiralty jurisdiction must have jurisdiction in a case of distribution of salvage where the original claim has been for salvage and the subsequent proceedings have introduced the question of distribution. Therefore, it was not intended by the legislature to exclude suits for distribution of salvage in those instances, nor do I consider such was the intention of the legislature where there had been no previous suit for salvage. That appears to me to be a fair construction of the words "any claim for salvage"; and without relying upon it as necessary for the support of my opinion, I also think that the 498th section of 17 & 18 Vict. c. 104, confirms my judgment in the matter. The words of that section, "any Court having Admiralty jurisdiction," are exactly the words used by the legislature in the County Courts Admiralty Jurisdiction Act, 1868. I am therefore of opinion that,

within the limits prescribed by that Act, county courts having Admiralty jurisdiction have jurisdiction in an original suit for distribution of salvage.

Upon the second point, it being admitted that the value of the property salved exceeds 1000*l.*, but that the claim is one for 250*l.*, or under 300*l.*, I am of opinion that the case comes within the category mentioned in the first subsection of the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868. I read that subsection as meaning, in the alternative, that the jurisdiction is conferred either when the property saved does not exceed 1000*l.*, or when the amount claimed does not exceed 300*l.* It was, indeed, fairly admitted that there was some corroboration of that opinion in the language of the subsequent Merchant Shipping Act (25 & 26 Vict. c. 63), s. 49, which has these words: "Such provisions shall extend to all cases in which the value of the property saved does not exceed 1000*l.*, as well as to the cases provided for by the previous Act." But independently, however, of any corroboration the view I take may receive from the section of the Act just cited, I am of opinion, as I have already stated, that the 1st subsection of the 3rd section of the Admiralty Jurisdiction Act, 1868, must be read in the alternative; that is, that the word "or" must be read as indicating the alternative, and that it would not be a correct interpretation of the statute to substitute the word "and" for the word "or" in the subsection in question. Upon both grounds, therefore, I am of opinion that the county court has jurisdiction in this suit for distribution of salvage, and I must pronounce accordingly. I reverse the sentence of the Court below, and make no order as to costs.

Solicitor for appellants: *Southgate.*
Solicitor for respondents: *Brownlow.*

1876
Nov. 28.

THE CYNTHIA. (H. 293.)

Collision—Control of Dock-master—Harbours, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *s.* 52—*Negligence of Master of Vessel entering Dock.*

The steamer *C.*, coming into the St. Katherine's Docks, fell against two barges, and drove them against a vessel called the *V.*, which was lying alongside the St. Katherine's Wharf; a skiff was between the *V.* and the wharf, and in such a position as not to be visible to those on board the *C.* By reason of the *C.* falling against the barges the *V.* was driven towards the wharf, and crushed the skiff against the wharf. At the time of the collision the *C.* was within the prescribed limits within which the jurisdiction of the dock-master extended, and she was coming into dock under the direction of the dock-master. A cause of damage was instituted in the City of London Court on behalf of the owner of the skiff and the owners of her cargo against the owners of the *C.* to recover for the damage done to the skiff and her cargo:—

Held, on appeal (reversing the judgment of the Court below), that the accident might have been avoided if the master of the *C.* had taken proper precautions in entering the dock, and that the *C.* must be condemned in the damage proceeded for.

This was an appeal from a decree of the City of London Court in an action of collision, instituted on behalf of the owner of the skiff *Emily* and the owners of her cargo against the steamship *Cynthia*.

The evidence given in the City of London Court was in substance as follows:—

At the time the collision occurred, the *Cynthia* was entering the St. Katharine's Docks under her own steam, having a Trinity pilot on board, and she was within the prescribed limits within the meaning of the 52nd section of the Harbours, Docks, and Piers Clauses Act. A steamer called the *Vigilant* was lying alongside the St. Katherine's Wharf close to the entrance of the dock. Outside the *Vigilant* two barges were lying, and inside, between the *Vigilant* and the wharf, the *Emily* was lying; she was in such a position as not to be visible to those on board the *Cynthia*. The dock-master was on the pier-head giving orders to vessels coming in and going out of dock. The *Cynthia* was allowed to fall against the barges in such a manner as to force the *Vigilant* against the skiff, and to cause the *Vigilant* to crush the skiff against the wharf.

According to the witnesses for the plaintiffs, the *Cynthia* had been swung by means of a rope from the pier-head, and after she had been swung, the rope was cast off, and the *Cynthia* was allowed to drop clear, and the tide carried her against the barges.

On behalf of the plaintiff it was contended that the *Cynthia*

ought to have had a tug to hold her, or she ought to have had a check rope made fast to one of the warping buoys in the river, called the Middle buoy. 1876 THE CYNTHIA.

The pilot of the *Cynthia* gave evidence for the defendants as follows:—

From the time I got the *Cynthia* within the prescribed limits I gave no orders except the orders given by the dock-master, and all those orders were obeyed. By the orders of the dock-master the *Cynthia* was allowed to drop with the tide. The dock-master gave no orders with respect to the barges. I pointed in that way to him as much as to say "the barges." He said, "All right, let her come."

The dock-master was called as a witness for the defendants, and he said:—

It is not usual for a vessel the size of the *Cynthia* to take a tug. I gave all the necessary orders to bring the *Cynthia* properly into dock. If the *Cynthia* had had a warp out to the Middle buoy I should have given orders to let it go. I gave no orders to prevent the *Cynthia* falling alongside the barges. I did not see the skiff.

The learned judge of the City of London Court (Mr. Commissioner Kerr) decreed that judgment with costs should be entered for the defendants. The owners of the *Emily* and her cargo appealed to this Court.

1876. Nov. 25. On this day the appeal was heard before the judge, assisted by two of the Elder Brethren of the Trinity Corporation.

It appeared by the proceedings in the Court below, filed in the registry for the purposes of the appeal, that the learned judge of the Court below, in the course of the hearing before him had made the following observations:—

MR. COMMISSIONER KERR. Primâ facie it was the duty of the people on board the *Cynthia* to have seen the position of the *Emily*, but at the time of the accident the *Cynthia* was under the control of the dock authorities. If the dock authorities had been defendants in the action, I should have made them responsible; but I cannot find that there is evidence of any act of negligence on the part of the *Cynthia*. She acted entirely in obedience to the orders that came from the dock-master. Here there is a statutory authority vested in the dock authorities to exercise an exclusive control within the prescribed limits. It has never been decided that it is in the power of any master or pilot to supersede the dock-master's orders if he thinks the dock-master is going wrong.

I find, as facts, that there was no order given with a view to keep the *Cynthia* away from the barges, and that the *Emily* was lying in a proper place. I cannot find as a fact that the *Cynthia* knew of the existence of the *Emily*, nor can I go into the question whether the *Cynthia* could have been kept off the barges if the

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dock-master had not required her to be got into the dock. I am of opinion that if the dock-master had been aware of the existence of the skiff he must have lost the tide rather than smash the skiff. I find as a fact that the dock authorities did not know that the skiff was in the position in which she was; in my opinion they might and ought to have known it. This finding, however, does not help the plaintiffs, as the action has not been brought against the dock authorities.

R. E. Webster and *W. G. F. Phillimore*, appeared for the appellants, the owners of the *Emily* and her cargo. No accident would have happened to the *Emily* if the master of the *Cynthia* had taken the ordinary precaution of putting out a rope to check the stern of the *Cynthia* from swinging against the barges. Such a precaution the master of the *Cynthia* was bound to take, and his owners must be answerable for the consequences of his neglect. It is true that the dock-master had given orders for the *Cynthia* to go into dock, but s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847, only gives the harbour authorities jurisdiction to regulate the time and mode of entering and leaving the dock, and does not free the owners of a vessel ordered to enter from liability in a case where, as here, the master of such vessel, whilst obeying the orders given, has been guilty of contributory negligence. This was virtually decided by this Court in the case of *The Belgic*. (1) The case of *The Bilbao* (2) will be relied on on the other side, but there the only question was, whether the collision had been brought about solely by the fault of the dock-master. The rule laid down by the Judicial Committee of the Privy Council in the case of *The Iona* (3) with respect to the duty of the master and crew of a vessel under the control of a pilot compulsorily in charge is equally the governing rule applicable in cases where the master of a vessel has negligently obeyed the orders of a dock-master, in entering dock without proper precautions.

Milward, Q.C., and *G. Bruce*, for the respondents, the owners of the *Cynthia*. The *Cynthia* at and previous to the collision was within the limits prescribed by the St. Katherine's Docks Act, 1864, that is, within 100 yards of the entrance of the dock (see the London and St. Katherine's Docks Act, 1864, 27 & 28 Vict. c. clxxviii. ss. 62, 92, and sched. 4, pt. ii. (6 Geo. 4, c. cv. s. 100)); she was, therefore, as a vessel going into dock, under the sole control of the dock-master for all purposes of navigation, and her

(1) See note at end of case, p. 57. (2) Lush. Adm. 149.
(3) Law Rep. 1 P. C. 426, 432.

master and crew were accordingly bound implicitly to obey his orders: *The Bilbao* (1); *The Excelsior.* (2) It was not the duty of the master of the *Cynthia* to interfere with the discretion of the dock-master as to what precautions should be taken in entering the dock, and if he had done so and damage had ensued he would have been held liable: *The Broeder Trow.* (3) Moreover, the *Cynthia* had a primâ facie right to enter the dock, and the only duty which in any circumstances could have been cast upon her master would have been to keep clear of such vessels as were visible. The position of the *Emily* was unknown to him. The case of *The Belgic* (4) really affords no guide to a decision in this case, for in that case no order was given to the master by the dock-master at all, but the collision was really brought about by an act for which the master was entirely responsible. The rules laid down with regard to contributory negligence in cases of compulsory pilotage can have little or no bearing where express control over a vessel is given by statute to a public officer.

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Webster, in reply.

Cur. adv. vult.

Nov. 28. SIR ROBERT PHILLIMORE. This is an appeal from the City of London Court. A small skiff, the *Emily*, was lying underneath a crane on the St. Katherine's Wharf in the River Thames, taking in goods, and outside of her lay a steamer called the *Vigilant*. Outside the *Vigilant* lay two barges. A steamer called the *Cynthia* coming into the St. Katherine's Dock, fell with her port side against the barges, drove the barges into the *Vigilant*, breaking her bobstay and figure-head, and also driving the *Vigilant* into the skiff, to which she did considerable damage.

The learned judge found as a fact that the skiff was in no way to blame, and had a right to recover against the dock company, but not against the *Cynthia*, against whom the action was brought. In his opinion the *Cynthia* was bound by the statutes, to which I will presently refer, strictly to obey the orders of the dock-master, and to take no measures except those which he prescribed. Those orders brought about the collision, and therefore the *Cynthia* was not to blame; and he dismissed her from the

(1) Lush. Adm. 149.
(2) Law Rep. 2 A. & E. 268.
(3) 17 Jur. 94.
(4) See note at end of case, p. 57.

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suit. There are two points raised for my consideration. First, was the *Cynthia* guilty of negligence which caused the collision with the skiff? Secondly, was she relieved from responsibility by being under the sole control of the dock company, whose orders she obeyed.

As to the first point, I have conferred with the Trinity Masters, and will state their opinion, in which I agree, to this effect:—

The *Cynthia* ought to have had a rope passed to the Middle buoy, to have been used if necessary. If she was found to be swinging on the barges, the rope would have enabled her to keep her quarter off the barges. She was dropping up with the tide and swinging alongside of the barges.

The pilot saw that she would come into collision with the barges, and pointed it out to the dock-master. The pilot had no right to calculate on touching the barges so lightly as not to cause damage to them or to the vessels on the other side.

With respect to the position of the skiff, we think that she was not in an improper place, but in the exercise of her clear right in lying where she was.

As to the contention that if a rope had then been there the *Cynthia* could not have got in that tide, in the first place, that would not justify her in doing damage to another vessel; in the second place, the Trinity Masters are of a wholly different opinion, thinking, on the contrary, that the rope would have assisted the *Cynthia* to go in without squeezing or damaging any other vessel.

As to the second point, the 10 Vict. c. 27, s. 52, and the local Act of the St. Katherine's Docks are relied upon by the respondents. The latter Act extends the distance within which the harbour-master's authority can be exercised to a hundred yards. The former statute provides that "the harbour-master may give directions . . . for regulating the time at which, and the manner in which, any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits. . . ." That is to say, the harbour-master's authority extends to the manner in which the vessel is to enter the dock, and her position when therein, and for a disobedience to his directions the 53rd section imposes a penalty of not exceeding 20*l*. But the Act did not, in my judgment, intend to exempt the pilot or captain of the vessel from the duty of navigating her with proper caution so

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far as other vessels are concerned; in other words, the orders of the harbour-master are to be executed with care, and not negligently, as in the present case. In the analogous case of exemption from liability by reason of having a pilot on board, it has been ruled by the Privy Council that in construing the Pilotage Acts it is not enough for the owners "to prove that there was fault or negligence in the pilot—they must prove, to the satisfaction of the Court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been, in any degree, conducive to the damage": *The Iona.* (1)

The authority of *The Bilbao* (2) was cited by the respondents; but that was a case decided on demurrer. I have looked at the papers, and find that the defence was as follows:—

And the defendant's proctor says that before and at the time of the damage complained of, those on board the *Bilbao* were acting under the directions given by the dock-master of the said Victoria Docks, and within the aforesaid limits of the authority of the said dock-master, and that the said damage, if occasioned by any mismanagement of the *Bilbao*, was solely occasioned by the default of the said dock-master, and that the owners of the said vessel are not responsible in law for the same.

It was a datum in that case that the damage was occasioned solely by the dock-master. Whereas, in this case, it appears that the damage was not caused solely by the orders of the dock-master, but by carelessness in their execution. I must reverse the sentence of the Court below, and pronounce the *Cynthia* to blame for this collision. Costs for appellants.

Solicitor for appellants: *Farnfield.*
Solicitors for respondents: *Flux & Co.*

1875
Nov. 16.

THE BELGIC. (7378.)

THIS was a cause of appeal from the City of London Court instituted in the High Court of Admiralty, on behalf of the owners of the steamship *Belgic* against the dumb barge *Kertch*, and her owners respondents intervening. The

(1) Law Rep. 1 P. C. 426, 432. See now, as to the rule laid down in the *Iona*, the judgment of the House of Lords in *Clyde Navigation Co.* v. *Barclay* (1 App. Cas. 790).

(2) Lush. Adm. 149.

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facts of the case and the nature of the judgment appealed from appear from the judgment of the Court.

Nov. 8. *Butt, Q.C., G. Bruce,* and *J. P. Aspinall,* appeared on behalf of the appellants and contended that before the collision the *Kertch* had been moored in an improper place, and that the collision was either inevitable or an accident for which the owners of the *Belgic* were not responsible, as it had been caused by the orders of the dock-master of the Victoria Docks, under whose control the *Belgic* was at the time of the collision, or of a pilot who then was on board the *Belgic* by compulsion of law.

R. E. Webster, and *F. W. Raikes,* on behalf of the respondents. The cases of the *Bilbao* (1) and *The Earl of Auckland* (2), 10 Vict. c. 27, ss. 52, 53, and 16 & 17 Vict. c. cxxxi. s. 46, were referred to.

Cur. adv. vult.

Nov. 16. SIR ROBERT PHILLIMORE. This is an appeal from the City of London Court in a cause of collision. The *Belgic*, a screw-steamer, 370 feet long and of between 2000 and 3000 tons, on the 25th of November last, in the daytime, came stern foremost out of the Victoria Dock and ran into a dumb barge or lighter called the *Kertch*, and sunk her, doing also damage to another barge. The owners of the *Kertch* brought their action against the *Belgic* in the Court below and obtained the judgment of the Court in their favour. The learned judge, assisted by nautical assessors, said that he did not decide any point of law, but he found as a fact that the pilot was not exercising control over the steamer and that the master did not take proper precautions in coming out into the river, and therefore was to blame for the collision. The appellants contend that this judgment ought to be reversed upon three grounds, viz. :— First, that the *Kertch* was to blame for lying where she did; secondly, that the *Belgic* was not responsible because she was under the orders of the dock-master or the pilot; and, thirdly, that the collision was inevitable.

This last ground may be at once disposed of. The collision was clearly evitable. Then, as to the first ground, the *Kertch* was a dumb barge laden with wood and iron for a ship in the Victoria Docks. The barge arrived at dead low water near the dock entrance, and brought up outside. There were fifty or sixty barges also laying alongside. Two hours before high water the *Kertch* was ordered by the dock company's servants to shift higher up, which order was obeyed, and one of them handed a rope after coming on board her, saying, "That will do, Bob, here is something that will hold you." Looking to these and other circumstances, I am of opinion that the barge was not to blame for lying where she did. The remaining ground of objection is now to be considered. I agree with the opinion of counsel that the learned judge of the Court below had not only a question of fact, but also, to some extent, a question of law, to consider; because if the master was to blame for this collision, it must be on the ground that neither the authority of the dock-master nor of the pilot had superseded at the time of the collision the authority of the master. The dock-master was naturally anxious to get rid of this long steamer in order to admit other vessels waiting to come in. The principal facts appear to be that the gates were opened about an hour and a half before

(1) Lush. Adm. 149. (2) Lush. Adm. 387.

high water. The dock-master ordered the *Belgic* to go out astern. About this time a schooner dropped her anchor near the mouth of the entrance. The pilot (who says he was not at that time in charge) seeing that a collision with the schooner on the one side or the barge on the other would be inevitable if the *Belgic* went out, took upon himself to order the *Belgic* to go ahead, thereby stopping her way. Upon this the dock-master said, "What are you going to do? you can't stop here; you are stopping our work." The pilot said, "We are going to do nothing." And after a pause the dock-master said, "Well, will you let our tug take hold of you and pull you out?" The pilot said, "As you like." The steamer was pulled out, the tug proved too weak to hold the steamer off, and she ran into the barge.

It has been pressed upon me that either the harbour-master or the pilot was in command. The pilot expressly says that he had not as yet taken charge, but I also think that the dock-master was still exercising his authority. I do not think it necessary to consider whether a master would be obliged by the dock-master to execute an order which manifestly would bring about a collision. I think he would not be so obliged, but I need not decide that point, because I am of opinion that no command was given to the master by the dock-master. A proposal was made, which was accepted on behalf of the master. The dock-master is not bound to find a tug for ships in dock, at least no such obligation has been shewn to me. The master chose to adopt the tug as his own motive power for the occasion, it proved too weak, and the master is as much responsible to third parties for the consequences as if it had been his own tug. I decline to reverse the decision of the Court below, and dismiss the appeal with costs. (1)

Solicitors for appellants: *Wood & Tinkler.*
Solicitor for respondents: *Farnfield.*

(1) From this judgment the owners of the *Belgic* appealed to the Court of Appeal. On the appeal coming on to be heard, the Court of Appeal, without calling on the respondents, dismissed the appeal with costs. C. A. Feb. 29, 1876.

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Jan. 13.

DENCH AND DENCH *v.* DENCH AND OTHERS.

Lithographed Will—Alterations—Not noticed by Witnesses—Declarations before Execution—Presumption.

The testator having obtained the lithographed form of a will by which the property was left to all the children absolutely on the death of the wife, filled up the blanks in his own handwriting, and in the place of the bequest to the children interlined the words "To my only son A. B." The bequest to all the children was cancelled by a line drawn through it. No reference was made to the alterations in the attestation clause, nor were any initials placed in the margin to identify them. The surviving attesting witness had no knowledge whether the alterations were made at the time of execution. The testator had one child, a son, by the second wife, who took a life interest under the will, and five children by a previous marriage. The Court held that the presumption arising from the ignorance of the witness was rebutted by a declaration of the testator, made previous to the execution of the will, that he intended to provide for the child of the second marriage and by the other circumstances of the case.

EDWARD DENCH, of 19, York Place, Brighton, Sussex, died on the 20th of January, 1876, having executed a will bearing date the 2nd of May, 1871, in which he appointed Mr. William Martin executor. The will was a lithographed form indorsed, "Form of a will for children absolutely after the death of the wife." It was to the following effect, the words in italics being in the handwriting of the testator, the rest lithographed. "This is the last will and testament of me *Edward Dench, of* 19, *York Place, Brighton.* I direct that all my just debts and funeral and testamentary expenses be paid and satisfied by my executors (*truster* written over this last word) hereinafter named as soon as conveniently may be after my decease. I give, devise, and bequeath all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder, or expectancy unto *Mr. William Martin,* ~~and~~ 10, *Gloucester Place, Brighton,* [sic.] their executors and administrators, upon trust, to permit and suffer my dear wife, *Mary Ann B. Dench,* to have the use and enjoyment of all such parts as shall not yield income, and to invest the residue of such of my estate as shall not have been applied in payment of my debts and funeral and testamentary expenses in some or one of

the public stocks or funds of Great Britain (not being terminable annuities), and to pay the dividends, interest, and annual produce thereof, and also the rents, interest, and profits of all such other parts of my said estate as shall yield income unto my said wife during the term of her natural life, and from and after her decease I give, devise, and bequeath the same and every part thereof to *my only son Harry Dench* (these words were interlined) and among all and every my children who shall be living at the time of the decease of my said wife in equal shares and proportions, and the issue of such of them as shall be dead (such issue, nevertheless, taking only such share to which their deceased parent should have been entitled in the event of such parent surviving my said wife) (all the words from the interlineation to this last word had been at some time either before or after execution cancelled by running a pen through them) to and for his or their own use and benefit absolutely, and I nominate, constitute, and appoint *Mr. William Martin, of* 10, *Gloucester Place,* ~~and~~ *Brighton, Sussex,* executor of this my will." The ordinary attestation clause followed, containing no reference to the alterations, nor were there any initials in the margin of the will to identify them. The will was on the first side of a sheet of paper and completed on that side.

The plaintiffs, namely, the widow, on her own behalf, and on behalf of her son, Harry Dench, propounded this will with the alterations and obliterations appearing thereon. The defendants pleaded that the obliterations, interlineations, and other alterations now appearing in the body of the said will, were not, nor was either of them, made in the said will before the due execution thereof by the testator.

William Beck, the only surviving attesting witness, deposed that he knew Mr. Dench, the testator, that in May, 1871, Mr. Dench came to his office as a wine merchant with a paper in his hand. His brother Edwin Beck was there. He asked Edwin Beck in deponent's presence to witness his will. Edwin Beck (since deceased) put his signature to it, and then deponent did so also. He identified the signatures of his brother and himself. The deceased wrote his signature just before they did, at any rate, it was there when they signed. The deponent did

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not look at the will when he signed it, and he has no recollection whether it was on a lithographed form. It was folded at the time, folded in half, shewing only the lower part. Deponent did not notice whether there were any lines struck out when he witnessed it, or whether there were any interlineations. He was busy at the time, and did not observe them. On cross-examination, he said that he and his brother were the only persons present when the will was executed. The table was covered with bottles, leaving only a narrow ledge vacant, which was the reason the will was folded. He could not say whether lines were drawn through any part of the lithographed form. He noticed two handwritings on the will. It seemed to him there were two writings.

Mrs. Dench, the widow, deposed that there was one child (Harry Dench) of her marriage with deceased. She had asked her husband to make a will in his favour. In June, 1871, her husband gave her a paper and said that would do for her, and in 1874 a packet of papers. She did not look at the papers in her husband's lifetime, but after his death it was found that the paper he first gave her was a will dated the 11th of August, 1868, executed before the birth of their child, by which everything was given to her absolutely, and she was named sole executrix. The will now propounded, and in its present state, was found in the packet given to her in 1874.

Mr. Martin deposed that some time after 1869 he visited the deceased at his house at Brighton, and the deceased told him he was going to make a will and name him executor, and that that poor boy (meaning his son by the second marriage) was to be provided for. On a subsequent occasion the deceased produced a will and read the contents to deponent. He then placed the will in deponent's hand, but deponent did not peruse it, nor could he say it was on a lithographed form. Moreover, he did not notice who witnessed it.

There was evidence that the deceased had five children by his first marriage who attained the age of twenty-one years; that, under the will of William Lambert, a relation of the first wife, real estate at Brighton, with a rental of 1000*l.* per annum, was left to the testator for his life, and on his death to the children of the

first marriage who attained the age of twenty-one years absolutely. One of such children attained the age of twenty-one years, but died in the lifetime of his father, who thereby succeeded to his share in the estate. The personalty of the deceased did not amount in value to more than 600*l.* or 700*l.*

In the course of the hearing a discussion arose whether the contents of the will, as read by the deceased to Mr. Martin, could be given in evidence as a declaration made subsequent to the execution of the will, and the cases of *Doe* v. *Palmer* (1), and *Sugden* v. *Lord St. Leonards* (2) were cited. Ultimately the Court decided that it would not act on that evidence.

Dr. Deane, Q.C. (*C. A. Middleton* with him), for the plaintiffs. The presumption arising from the want of evidence as to the time alterations were made in a will is not so strong in a lithographed as in a written will, because there must necessarily be some alterations and additions made in such a will before execution. All that appears in the handwriting of the deceased was necessary to carry out his intention as expressed to Mr. Martin to make him executor, and that the poor boy should be provided for. The second will was executed to correct the first made before the birth of the child, and which left everything absolutely to the wife. It is inconceivable that the deceased should not have made the alterations before the execution.

Inderwick, Q.C. (*Searle* with him). In a lithographed will a very different presumption arises where it is filled up to complete the form, from where it is filled up to alter the purport of the printed form and reverse its dispositions. In this case the form was endorsed "A form of a will for children absolutely after the death of the wife," and it must be presumed that when the deceased purchased that form he intended to divide his property amongst all his children on the death of his wife. As regards the declaration of the deceased, he may have thought that, by nominating an executor and by specially inserting his son Harry's name in the residuary clause, the interest of that son would be looked after. The ordinary presumption, in the absence of evidence to the

(1) 15 Q. B. 747; 20 L. J. (Q.B.) 367. (2) 1 P. D. 154, 225.

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contrary, that alterations were made subsequent to execution, must prevail in this case.

SIR J. HANNEN (President). The question is, whether the will shall be admitted to proof with the alterations contained therein, more especially whether the words in the residuary clause struck out are to be omitted, and the words *my only son Harry Dench* interlined therein are to be introduced into the probate. I do not think it necessary on this occasion to determine the question whether or not a statement made by a testator after the execution of his will, that the will as altered was his, would be admissible, because from Mr. Martin's evidence it would not follow that the alterations, although made before the conversation with him, were made before the execution of the will. It is clear in law that when a question arises whether alterations on the face of a will were made before or after execution, the statements of a testator made before the execution of the will may be given in evidence, shewing an intention to benefit an individual, which will not be carried out unless the alterations are admitted. That was laid down in *Doe* v. *Palmer* (1), and the rule has been recognised since. I shall adopt it on this occasion and apply it to the facts before me. At the time he made his will the deceased was not possessed of much property, about 600*l.* or 700*l.*, and although he might have foreseen the possibility of deriving a benefit from the death of one or more of the children of the first marriage after they came of age (and he did, in fact, come into possession of one of such children's shares) the language of the will probably referred to the property of which he was then in possession. After the child of the second marriage was born his attention was called to the necessity of making a provision for that child, and although Mr. Martin does not give the exact date of his conversation with the deceased, he is under the impression that the second will was made to carry out the intention expressed in such conversation. From the evidence of Mr. Martin it is certain that the testator intended to make a special provision for the child of the second marriage, "the poor boy must be provided for or looked to." If the will is to

(1) 15 Q. B. 747.; 20 L. J. (Q.B.) 367.

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stand in the way it was drawn in the lithographed form before the alterations were made, Harry Dench would share only with his other brother and sisters of the half-blood in personalty, which might have been of the value of 700*l.*, a provision for him of 100*l.* and no more, against 200*l.* per annum received by each of the other children. It would be idle to speak of that as a fulfilment of the intention expressed by the deceased to provide for the poor boy. And as it is a provision that does not satisfy the expressed intention of the testator, it is incredible that the will was executed in that form. But I find that alterations have been made in the will which would carry out the expressed intentions of the testator, by which he leaves all the property to Harry Dench which he had given to his mother for her life. That is a disposition which leads me to think that the alterations must have been made before the time of the execution of the will. If otherwise, the will would not have carried out the intentions of the testator, but have disappointed them. I rest my decision on the declaration of the testator, and not on the appearance of the document. I cannot draw any conclusion from the colour of the ink, and the evidence of the attesting witness leaves the question quite undecided, for the will was turned down and doubled in half when he signed it, and he is not able to say what alterations were there. The reason, therefore, why I have come to the conclusion to admit the will to probate in its present state is, that the alterations must have been made at the time of execution, otherwise the document would not have carried out the expressed determination of the testator to provide for the son of the second marriage.

Solicitors for plaintiffs: *Waddilove & Nutt.*
Solicitors for defendants: *Nash & Field.*

1877
Jan. 23.

IN THE GOODS OF DE ROSAZ.

Will—Appointment of Executor—Ambiguity—Parol Evidence.

The deceased, by his will, appointed certain executors, and amongst others "Percival —— of Brighton, the father." The Court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein.

THE Chevalier François de Rosaz, of Brighton, Sussex, died on the 21st of September, 1876, having duly executed his last will and testament, bearing date the 11th of September, 1876. By this will he gave considerable bequests to institutions and for charitable purposes at Brighton, and appointed executors as follows:—

"The Mayor of Brighton pro tempore being.

"The precedent *May* of the precedent year.

"The very Reverend Canon . . . Rymer, Rector of St. Joseph Church Catholic of St. James Street, Brighton, and all his successors pro tempore being.

"The Rector of the Presbyterian Church pro tempore being.

"The Rector of St. Nicholas Church pro tempore being.

"Robert Frederick . . . Director of Union Bank, Chancery Lane.

"Francis Bradley Archer, Assistant Director of Union Bank.

"Percival . . . of Brighton, Esquire, the Father.

"Hamilton Ross, Esquire, of London.

"The Director of the Museum of Brighton pro tempore being.

"The Curate Assistant of St. Joseph pro tempore.

"I appoint as the solicitor of the executorship of my will Richard Taylor, junior."

Charles Frederick Toovey, in his affidavit, stated that he assists his father in his business of a law stationer. That in the year 1876 the Chevalier de Rosaz forwarded to their office a rough draft of his will contained in several pieces of paper, which he instructed them to have engrossed for his signature. That the same was very badly and illegibly written, and when the clerk to whom

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such draft had been given came to that part of the draft where the testator named his executors he was unable to read the surnames of two of the persons intended to be appointed as executors, and by his father's directions the clerk left such surnames in blank, one of which was "Percival —— of Brighton, Esquire, the father." When the will was engrossed the deponent took it to the testator at his residence, and pointed out to him the two blanks. He then commenced to read to the testator the will as engrossed, but did not do so completely from the beginning to the end, as testator was unwell, and got impatient and apparently weary of attending to the reading, and asked deponent to leave, which he did. The will was afterwards executed by the testator without having had the blanks filled up. In a second affidavit the deponent admitted that the name which appeared after Percival in the draft will was clearly Boxall, and that if he had looked at the paper at the time he should have ordered that name to be inserted. Mr. Boxall, in his affidavit, stated that he became acquainted with the testator in the year 1872. That in the year 1873 the testator continually consulted deponent both by letter and verbally, as to certain bequests he signified his intention to make for the benefit of the town of Brighton, and asked deponent, who took a leading part in the management of such charities, to prepare a list of the most deserving, which was done, and to be his executor and trustee. In the beginning of the year 1875 the testator brought deponent a paper, which he said was his will, and requested that a copy should be made of it for the use of deponent. That was done. It was dated the 2nd of December, 1874, and appointed deponent executor. He continued to be intimate with testator until the time of his death. Deponent's names are William Percival Boxall, but he was known and addressed by deceased and others as Percival only. He has a son, with whom the deceased was acquainted, whose names are Percival Gratwich Boxall. It did not appear that there was any other person known to deceased of the name of Percival.

Dec. 12, 1876. *C. A. Middleton*, moved the Court to grant probate of this will to Mr. William Percival Boxall, as the person intended by the testator under the description of "Percival . . .

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of Brighton, Esquire, the father." He submitted that the Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and place itself in his position in order to ascertain if it can, with sufficient certainty, the persons or things designated by the language used therein. The facts clearly proved and admissible in this case, apart from evidence of intention, were sufficient to satisfy the Court that his client was the person intended by the words "Percival . . . of Brighton, Esquire, the father." He further contended that if that was not sufficient, this was a case of equivocation, and, as such, evidence of intention was admissible. He referred to *Price* v. *Page* (1); *Doe* v. *Hiscocks* (2); *Charter* v. *Charter* (3); Jarman on Wills, 3rd ed. pp. 402, 403.

Bayford appeared for the other executors.

Cur. adv. vult.

Jan. 23. SIR J. HANNEN (President). This was an application for a grant of probate to a person claiming to be one of the executors named in the will of the Chevalier François de Rosaz, deceased. The testator appointed several persons executors of his will, and amongst them one is thus described, "Percival of Brighton, Esquire, the father." The applicant, whose complete names are William Percival Boxall, claims to be the person designated by the testator. The first question which I have to determine is, whether parol evidence is admissible to any, and if to any, to what, extent, in order to assist the Court to ascertain the meaning of the testator as expressed in his will. I have said *as expressed in his will*, because it is clearly settled law that the Court is not entitled to inquire into the intention of the testator apart from the language which he has used. The whole of the testator's will must be in writing, and the Court is therefore confined to putting an interpretation on words actually used by him; or as the rule is expressed by Sir J. Wigram (paragraph 6): "The judgment of a Court in expounding a will should be simply declaratory of what is in the instrument." In considering, therefore, whether a particular person or thing has been sufficiently indicated by a testator,

(1) 4 Ves. 680. (2) 4 M. & W. 363.
(3) Law Rep. 7 H. L. 364.

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there must be some words to which the required meaning may be attached. A complete blank cannot be filled up by parol testimony, however strong. Thus a legacy to Mr. —— cannot have any effect given to it: *Baylis* v. *Attorney General* (1), nor a legacy to Lady ——: *Hunt* v. *Hort.* (2) But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to to shew what that meaning is. Thus a legacy to a person described by an initial, as to Mrs. C., admits of explanation as by shewing that the testator was accustomed to speak of a particular person by the initial of her name: *Abbott* v. *Massie* (3), *Clayton* v. *Lord Nugent.* (4) And where a blank was left for the Christian name, parol evidence has been admitted to shew who was intended: *Price* v. *Page.* (5) In the present case there are words which are capable of bearing an intelligible meaning. Looked at by themselves, without the aid of extrinsic evidence, they convey this meaning, that the testator appoints as one of his executors a person bearing the Christian name of Percival, who resides at Brighton, and has a son.

The question is, whom did the testator intend to point out by this description? In order to answer this question, Sir J. Wigram's fifth proposition must be called in aid: "For the purpose of determining the object of a testator's bounty, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator and of his family and affairs for the purpose of enabling the Court to identify the person intended by the testator." Applying this proposition to this case, it appears that the testator had an intimate friend of the name of William Percival Boxall (the present applicant), residing in Brighton; that the testator was accustomed to address him as Percival, omitting the name of William; that he had appointed him as his executor under a previous will; that Mr. Boxall had a son also named Percival, well known to the testator; and lastly, that no one else bearing the name of Percival, either as surname or Christian name, was known to him. In these circumstances it appears to me that the words used by the

(1) 2 Atk. 239.
(2) 3 Bro. C. C. 311.
(3) 3 Ves. 148.
(4) 13 M. & W. 207.
(5) 4 Ves. 680.

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testator necessarily point to the present applicant. It is true that at the present day, and amongst persons of the station in life occupied by the deceased, it is at least unusual to designate a man by his Christian name without the surname, though accompanied by his place of residence and the distinguishing adjunct of "the elder" or "the father"; but though unusual, it is not incorrect, and assuming, as I am bound to do, that the words are really those of the testator, circumstances may be easily imagined which would account for his making use of such a description. Suppose a testator should desire to leave a legacy to a particular person whose surname was unknown to him; not an uncommon state of things amongst the poor in some parts of the country. A description of him by his Christian name and his place of abode in a small village would, in many cases, be sufficient. If the name were an uncommon one, the evidence would be stronger; and if he were described as the father, and it were shewn that no other person than one father and one son bore that name in the parish, the case would amount to certainty, and though it may be conjectured that greater difficulty might arise in ascertaining who was meant as to a person bearing a common Christian name and residing in a populous place, such as Brighton, this cannot alter the principle applicable to the two cases. There is, however, in this case no reason to suppose that there is any person to whom the description given in the will can apply unless it be to the present applicant, indeed, there is evidence that there is no such person; and I am therefore able to see without any doubt that the applicant is the person designated by the language of the will.

I have dealt with the case thus far on the supposition that evidence of testator's declarations of intention are not admissible. In the case of *Charter* v. *Charter* (1) the Lord Chancellor (Lord Cairns) says: "The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons or two things." Sir J. Wigram states the proposition thus (prop. 7, par. 194): "The only cases in which evidence to prove intention is admissible are those in which the description in

(1) Law Rep. 7 H. L. 377.

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the will is unambiguous in its application to each of several subjects." If these expositions of the law are to be taken without any qualification, evidence of the testator's expressed intention could not be given in this case, for there is here only *one* known subject to which the testator's language can apply. It is possibly open to question whether such a case as this was in the contemplation of Lord Cairns and Sir J. Wigram. As I have said, it is not shewn here that there is any other person who could properly be designated as "Percival of Brighton, Esquire, the father." If there were any such, parol evidence of the testator's intention would be admissible; is such evidence the less admissible because the claimant has no competitor? Probably the answer is, that if the description in the will is in itself sufficient to define the only known subject to which it is sought to apply it, no evidence of intention is needed; if it is insufficient, such evidence is inadmissible. "In point of principle," says Sir J. Wigram (prop. 7, par. 192) "it is submitted that a description which is so imperfect as to be useless as it stands—i.e. useless unless it be aided by evidence of intention—is not distinguishable from one which is wholly incorrect." It is not, however, necessary for me to express a positive opinion on this point, as I decide the case irrespective of the testator's expressed intention; but if evidence of his declarations be admissible, the matter might have been disposed of in a very few words, for I have before me the draft in the testator's own handwriting, from which the will was copied, and in that the name of Percival Boxall is clearly written. The explanation of the omission being, that in the haste of copying the word was passed over as illegible, though the stationer now admits, as the fact is, that the word is plainly discernible. The interests involved in the present application are of small importance, but I thought it necessary to consider it at some length on account of the serious question of principle on which its determination depends.

Solicitors for applicant: *Boxall & Boxall.*
Solicitors for other executor: *Taylor & Son.*

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IN THE GOODS OF BLACKWELL.

Will—Appointment of Executors—Uncertainty.

The testator, by his will, appointed one of his sisters sole executrix. He had three sisters living at that time, but two died in his lifetime:—

Held, that the appointment was void from uncertainty.

BENJAMIN BLACKWELL, late of Chertsey, Surrey, died on the 10th of December, 1876. He executed a will dated the 1st of June, 1868, to the following effect:—"This is the last will and testament of me, Benjamin Blackwell, of Chertsey, in the county of Surrey, grocer and cheesemonger. I devise and bequeath all my real and personal estate, of whatsoever nature or quality, and wheresoever situate, of which I may be possessed or entitled unto at the time of my death, unto my three sisters, viz., Jane, Mary Ann, and Ann Blackwell, or to which of them as are alive at the time of my decease. And I do hereby appoint one of my sisters my sole executrix of this my last will, hereby revoking all other wills or testamentary bequests by me at any time heretofore made."

Mary Ann and Ann died in testator's lifetime. Jane Blackwell, now eighty years of age, alone survived him.

Searle moved for probate to be granted to Jane Blackwell. Although there was some uncertainty as to whom the testator intended to appoint as his executor at the time he made his will, that uncertainty had ceased when the will came into operation, for there was only one sister then living. [He referred to *In the Goods of Baylis* (1); Jarman on Wills, 3rd ed. vol. i. p. 330.]

SIR J. HANNEN (President). The question is, which sister did the testator appoint as executrix. I cannot infer from the words of the will that the testator intended to appoint any particular sister executrix. I may conjecture that he would have given directions to appoint the surviving sister if he had foreseen the events that have happened; but he has not done so. I cannot distinguish this case from that of *In the Goods of Baylis* (1), and I reject the motion.

Solicitors: *Nelson, Son, & Hastings.*

(1) 2 Sw. & Tr. 613; 31 L. J. (P. M. & A.) 119. 8 Jur. N.S. 546

Followed. In re GOVIER, DECD. [1950] P. 237

IN THE GOODS OF HUGO. 1877

Will—Conditional—Clause of Revocation. *Feb.* 20.

The deceased made a will, by which he left all his property to his wife, and made her sole executrix. He subsequently, with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time and by one and the same accident. By this will they revoked all former wills. The deceased died in the lifetime of his wife:—

Held, that the joint will was dependent upon a contingency which did not happen, and was, therefore, inoperative even to revoke a previous will.

THE Reverend Thomas Hugo, of the Rectory, West Hackney, Middlesex, died on the 31st of December, 1876, leaving a widow, Agnes Jane Hugo, and three sisters, Avis, Frances Mary, and Elizabeth Hugo surviving him. On the 15th of March, 1864, he duly executed his will on a lithographed form, by which he left his whole property, real and personal, to his wife absolutely, and appointed her sole executrix. On the 12th of October, 1874, he and his wife duly executed a joint will, which commenced: "This is the last will and testament of us, Thomas Hugo and Agnes Jane Hugo, his wife, residing at the Rectory House, West Hackney, in case we should be called out of this world at one and the same time and by one and the same accident." They thereby appointed the Reverend John Young, the Reverend Bradley Abbot, and the Reverend Charles Gutch trustees and executors, left an annuity to the sisters of Mr. Hugo, and the residue of the joint property to found, so far as it would, a fund for old, infirm, and destitute priests of the Catholic Church, whether Greek, Roman, or Anglican, celibates or widowers, to be called the fund of the Good Shepherd, and revoked all former wills. It appeared, from the affidavit of Mrs. Hugo, that, in the month of October, 1874, her husband and herself were about to make a railway journey, and there having been then very recently a serious railway accident, they agreed to make a joint will, to take effect in the event of their meeting with such an accident, and both being killed at the same time, which accordingly her husband wrote out. They, however, returned home in safety.

After the death of the deceased the will of 1864 was found in an envelope, with five sheets of note paper, headed "Earnest wishes," containing directions in the handwriting of the deceased, and dated, "The morrow of the feast of our Lord's Ascension,

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1875." The joint will was found loose amongst other papers. The executors of the joint will and the sisters of the deceased consented that probate should be granted of the will of the 15th of March, 1864.

Dr. Swabey moved accordingly. There is no doubt that the will of October, 1874, is inoperative as being dependent upon a contingency which never happened. But a difficulty has been raised, whether, it having been duly executed and containing a clause revoking all former wills, the will of 1864 is not thereby invalidated. In the paper headed "Earnest wishes," written by the testator in 1875, he assumed that the will of 1864 was still operative, and that the whole property would belong to his wife. It is submitted that every part of the will, the clause of revocation included, is dependent upon the contingency, and that the deceased never intended that, if his wife survived, the previous will should be revoked. [He referred to *Parsons* v. *Lanoe* (1); *In the Goods of Winn* (2); *In the Goods of De Silva.* (3)]

SIR J. HANNEN (President). I think this application must be granted. In the case of *In the Goods of De Silva* (3) Sir C. Cresswell granted probate of a codicil, although conditional, because it would have the effect of republishing the will, or even of making it valid, if it had not been duly executed. I agree in that decision, relating as it does to a codicil to a will. Now, the question I have to consider is, whether this instrument ought to be admitted to probate at all as the will of the testator. To determine that I must see whether or not the bequests are left absolutely or only conditionally. The words are, "This is the last will and testament of us, &c., in case we should be called out of this world at one and the same time and by one and the same accident." The condition did not happen, and I consider, therefore, the will is inoperative. The same question was before this Court on two occasions, *In the Goods of Winn* (2), and in *Roberts* v. *Roberts.* (4) In the last case the testator executed the paper lest anything should happen to him on his passage to Wales, or during his stay there. He returned from that trip, and the Court held that the paper was conditional, and on that ground pronounced against it. The

(1) 1 Ves. Sen. 190.
(2) 2 Sw. & Tr. 147.
(3) 2 Sw. & Tr. 315; 30 L. J. (P. M. & A.) 171.
(4) 2 Sw. & Tr. 337; 31 L. J. (P. M. & A.) 16.

observation of counsel that if the will be conditional the condition must attach to the whole document, is, I think, well founded, and therefore, when the testator revoked all former wills, he only did so subject to the happening of the contingency. I decree probate of the will of March, 1864.

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Proctors: *Heales & Son.*

ROBINSON *v.* ROBINSON.

Feb. 20.

Suit for Dissolution by Wife—Counter-charges—Res judicata—Practice.

In a suit for dissolution brought by the wife, the respondent made counter-charges of adultery against her. On the allegation that the charges so made were identically the same as those made in a previous suit brought by the husband, in which a jury had decided that the wife had not been guilty of adultery, the Court, on motion, was asked to strike out the paragraphs containing such charges:—

Held, that in order that all the facts should appear on the pleadings, the proper course was for the petitioner to file a replication, so that the respondent might reply to it.

MR. ROBINSON having instituted a suit for a dissolution of his marriage by reason of his wife's adultery with two co-respondents, Messrs. Petrocochino and Furber, and the wife having filed an answer denying such adultery, the question in dispute was tried before the Judge Ordinary and a special jury in December, 1876, who found a verdict in favour of the respondent in that suit on all the charges. A new trial was afterwards moved for, but refused. Mrs. Robinson then instituted a suit for dissolution of marriage against her husband by reason of his adultery, cruelty, and desertion, in which suit he filed an answer denying the charges, and making counter-charges of adultery against her. These charges consisted: (1.) of adultery with one of the co-respondents in the previous suit, Furber; (2.) of adultery with some person unknown at certain times and places identical with times and places set out in the previous suit; (3.) of adultery, which, although not formally pleaded in the previous suit, was known to Mr. Robinson at the time such suit was pending, as appeared from the nature of the examination and cross-examination of the witnesses on his behalf.

Feb. 13. *Sir H. S. Giffard, S.G.*, *Inderwick, Q.C.*, and *Bayford*, for the petitioner, applied to the Court to order that the para-

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graphs containing such charges of adultery be struck out of the answer. The charges of adultery are substantially the same as those tried in the previous suit, in which the jury gave a verdict in Mrs. Robinson's favour. The matter being res judicata, the respondent cannot set up the same charges as a defence in this suit. As regards the form of the application, there is no settled practice, and it seems to be convenient to raise the question in the simplest and shortest way by moving that the paragraphs be struck out. [They referred to *Finney* v. *Finney* (1); *Lord Bagot* v. *Williams*. (2)]

Ballantine, Serjt., and *Walter Ballantine*, for the respondent. As no affidavits have been filed, there is no evidence to bring to the legal knowledge of the Court whether or not the charges now made are the same as those made on the previous occasion. The identity is material. It has been held in several cases that if the objection of an estoppel is not pleaded, it will be taken to be waived. The petitioner must file a replication, and until that is done, and the Court is satisfied of the identity of the charges in the two suits, the answer should stand. [They referred to Smith's Leading Cases (ed. 1876), vol. 2, p. 799; *Vooght* v. *Winch* (3); *Doe* v. *Huddart* (4); *Conradi* v. *Conradi*. (5)]

Cur. adv. vult.

Feb. 20. THE JUDGE ORDINARY. This was an application to strike out certain passages in respondent's answer charging the petitioner with adultery on various occasions, on the ground that the same charges were preferred in a former suit by the present respondent, the husband, against the petitioner, and were negatived by the verdict of a jury. The application is not founded upon any affidavits, but is based on the assumption that, as I was the judge before whom the issues in the former petition were tried, I have judicial knowledge that the same charges were then in issue. But this is a mistake. All applications which involve a reference to another cause should be supported by affidavits of the facts, because it is a mere accident that the same judge presides on the two occasions; and in the event of the case going before any other judge, or before the proper Appellate

(1) Law Rep. 1 P. & M. 483.
(2) 3 B. & C. 235.
(3) 2 B. & Ald. 662.
(4) 2 C. M. & R. 316.
(5) Law Rep. 1 P. & M. 391.

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Court, if I were to make the order prayed for there would be nothing to shew the grounds on which I had proceeded. But apart from this objection of form, I think the respondent is entitled to insist on the question being raised by replication, in which it will be incumbent on the petitioner to state with exactness the facts on which she relies to shew that the respondent is estopped from setting up the charges he now makes; and thus the very important questions which were mooted in the Solicitor General's argument will be placed on record for formal decision.

Solicitor for petitioner: *E. Bromley.*

Solicitor for respondent: *C. H. Hodgson.*

[IN THE COURT OF APPEAL.]

March 6.

ROBINSON *v.* ROBINSON.

Practice—New Trial in Divorce Court—Appeal from Refusal of New Trial—Divorce Court Act, 1860, *s.* 2—*Judicature Act*, 1873, *ss.* 16, 19—*Appellate Jurisdiction Act*, 1876, *s.* 20.

The Court of Appeal has no jurisdiction to entertain an appeal from an order of the President of the Divorce Court granting or refusing a new trial; but the appeal must be brought to the full Court of Divorce, which has not been abolished by the Judicature Acts.

Westhead v. *Westhead* (ante, p. 1) adhered to.

THIS was an appeal from an order of the President of the Divorce Court.

The suit was instituted by Mr. Robinson for dissolution of marriage on the ground of his wife's adultery. At the trial a verdict was found for the respondent, and Mr. Robinson moved for a new trial. The application having been refused by the President of the Divorce Court, Mr. Robinson appealed.

Sir H. S. Giffard, S.G., Inderwick, Q.C., and *Dr. Bayford*, for the respondent, objected that there was no appeal to the Court of Appeal from an order made on an application for a new trial in the Divorce Court. They referred to *Westhead* v. *Westhead.* (1)

Ballantine, Serjt., Dr. Spinks (*W. Ballantine* with him), for the respondent. The application in *Westhead* v. *Westhead* (1) was made ex parte, and the sections of the Judicature Act bearing on

(1) Ante, p. 1.

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the question were not fully gone into. It is true that by the Divorce Court Act, 1860 (23 & 24 Vict. c. 144), the decision of the full Court of Divorce was made final in such a case as this. But it was assumed in *Westhead* v. *Westhead* (1) that the full Court of Divorce was still in existence. This is not the case, for it has been abolished by the Judicature Act, 1873; not, perhaps, by express words, but by necessary implication. The 3rd section creates a Supreme Court, in which are consolidated the Probate Court and the Divorce Court, which were before separate Courts, and all the other Courts; and the 4th section divides the Supreme Court into two parts, one of which is to have appellate jurisdiction; and this appellate jurisdiction is, by the 19th section, to be from any order or judgment of the High Court of Justice, save as thereinafter mentioned, or of any judge or judges thereof. As the appellate jurisdiction of the full Court of Divorce is nowhere specially reserved, those words must include all orders made by the President of the Divorce Court. It would be against the spirit of the Act for the full Court of Divorce to sit as an independent Court of Appeal, distinct from the Court of Appeal created by the Act; nor is it easy to say of whom the full Court of Divorce is now composed, if it really exists.

[MELLISH, L.J. Sect. 44 of the Judicature Act, 1873, which provides for Divisional Courts being held for the transaction of any part of the Probate, Divorce, and Admiralty Divisions, appears to be in your favour, as it shews an intention to assimilate appeals in that division to those in the other divisions of the High Court.]

There is nothing in the Judicature Acts to qualify the right of a suitor to appeal to the Court of Appeal from any order of a judge or Court of this division; and even if the full Court of Divorce were still in existence, there would be an appeal from it to the Court of Appeal. Therefore, at the time when the Appellate Jurisdiction Act, 1876, passed, this was not a case in which the jurisdiction of the Court or judge was final within the 22nd section. Consequently the right of appeal is not excluded by that section.

JAMES, L.J. I am of the opinion that the decision in *Westhead* v. *Westhead* (1) must be adhered to. There is nothing in the

(1) Ante, p. 1.

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Judicature Act to abolish the jurisdiction of the full Court of Divorce. Its decision as to granting or refusing new trials was made final by Act of Parliament before the passing of the Judicature Act, 1873. It is, therefore, impossible to say that the jurisdiction of the Court of Appeal is not excluded by the 20th section of the Appellate Jurisdiction Act, 1876.

MELLISH, L.J. I am of the same opinion. The only real question is, whether the jurisdiction of the full Court of Divorce, which was created by the Divorce Acts, is destroyed by the Judicature Act, or is transferred to the High Court of Justice. There are no words in the Act abolishing it, and there are words in s. 16 quite sufficient to transfer to the judges of the High Court all the jurisdiction which was previously vested in the judges of the other Courts. Therefore, in my opinion, the jurisdiction of the full Court of Divorce was reserved. There may have been some question before the passing of the Appellate Jurisdiction Act, 1876, whether a party appealing from the Judge of the Divorce Court in such a case as this was obliged to go to the full Court of Divorce, or might at his option go to the Court of Appeal at once. I am inclined to think he must have gone to the full Court of Divorce first, and then to the Court of Appeal. But that doubt has now been removed by the Appellate Jurisdiction Act, which takes away the right of bringing an appeal to the Court of Appeal.

BAGGALLAY, J.A., concurred.

Solicitors: *C. H. Hodgson; E. Bromley.*

LE SUEUR *v.* LE SUEUR.

March 6.

Practice—Divorce Court—Power of Court of Appeal to order the Queen's Proctor to be served—Divorce Court Act, 1860, *s.* 5—*Judicature Act*, 1873, *s.* 19.

The Court of Appeal has the same power as the High Court of Justice to order the Queen's Proctor to be served under the 5th section of the Divorce Court Act, 1860.

THIS was a suit for dissolution of marriage brought by a wife on the ground of her husband's adultery and desertion. The parties were married in the Island of Jersey, but the husband had gone to the United States of America where he was domiciled, and the

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petitioner was now resident in England. The Judge of the Probate Division decided that the petitioner, even if she could acquire a domicil in this country distinct from that of her husband, could not make her husband amenable to the lex fori of her new domicil, and dismissed the petition. (1)

The petitioner appealed from this decision. On the hearing of the suit in the Probate Division the husband did not appear, and the Queen's Proctor, by direction of the Court, was served, and was heard by counsel. The Queen's Proctor was also served with notice of the appeal, and, at the desire of the Court, counsel was instructed on his behalf.

Keogh appeared for the petitioner.

Bowen, for the Queen's Proctor, said that the question had arisen whether the Court of Appeal had now the power which was given to the Divorce Court by the Divorce Court Act, 1860 (23 & 24 Vict. c. 144) to direct the Queen's Proctor to be served. He referred, however, to the Judicature Act, 1873, s. 19, which enacts that for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction the Court of Appeal should have all the power, authority, and jurisdiction by the Act vested in the High Court of Justice.

JAMES, L.J. I think it is clear that the Court of Appeal has the power vested in the Divorce Court by the Divorce Court Act, 1860, s. 5, of ordering the papers to be sent to the Queen's Proctor. Let this, therefore, be done.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

The case stood over till the 10th of March to be argued; but before that day it was ascertained that the petitioner had gone to America, and had there obtained a sentence of divorce from her husband. The appeal was therefore withdrawn.

Solicitor for petitioner: *W. H. Roberts.*

(1) 1 P. D. 139.

SOTTOMAYOR, otherwise DE BARROS *v.* DE BARROS. 1877
March 17.

Nullity of Marriage—Consanguinity—First Cousins—Marriage illegal by the Law of Domicile.

The petitioner and respondent, Portuguese subjects and first cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the city of London. In 1873 they returned to Portugal, and continue to reside there. By the law of Portugal a marriage of Portuguese subjects, being first cousins, without dispensation, wheresoever contracted, is invalid:—

Held, that the Court of the place of contract of marriage is not bound to recognize the incapacities affixed by the law of the domicile on the parties to a contract of marriage, if such incapacities do not exist according to the lex loci contractûs, and to pronounce a marriage, otherwise valid, to be null and void by reason of such incapacity.

In this case the petitioner Ignacia Clara Maxima Pacheco Pereira Pamplona da Cunha Sottomayor, described as of Lisbon, in the kingdom of Portugal, applied to the Court to declare her marriage with the respondent Gonzalo Lobo Pereira Caldos de Barros to be null and void. The petition set out a form of marriage between the parties on the 21st of June, 1866, at the registry office in the city of London; it then proceeded:—2. That your petitioner and the respondent are both natives of Portugal and Portuguese subjects, and were at the date of the said marriage domiciled in the kingdom of Portugal. 3. That your petitioner and the respondent are natural and lawful first cousins, and that according to the law, in force in Portugal at the time of the said marriage and now, first cousins are incapable of contracting marriage on account of consanguinity. 4. That your petitioner and the respondent have never cohabited as husband and wife, and the said marriage has never been consummated, and for the reasons aforesaid is null and void in law. 5. That the marriage aforesaid was procured by fraud upon the petitioner. 6. That when the petitioner went through the said ceremony of marriage she was ignorant that she was contracting a valid and binding marriage. (These two last paragraphs were added by authority of the Court in an order dated the 5th of July, 1876.)

The petition was personally served upon the respondent at

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Labrosa, in Portugal, and he entered an appearance to the citation, but did not file an answer, and the matter came on for hearing as unopposed before Sir R. J. Phillimore on the 5th of July, 1876, who directed that the petition when amended should be served on the solicitor of the respondent, and that the papers in the suit should be sent to her Majesty's Proctor in order that he might, under the direction of the Attorney General, instruct counsel to argue before the Court the question whether the petitioner had shewn a sufficient ground for a decree of nullity, first, by reason of the incapacity of the parties to contract marriage in 1866; secondly, by reason of fraud as shewn by the evidence laid before the Court; thirdly, by reason of the petitioner's want of intention to contract a marriage, and of her ignorance of the effect of the ceremony as shewn by the evidence already laid before the Court.

In consequence of this order, on the 22nd of November, 1876, the Queen's Proctor filed his answer as follows:—1. That the petitioner and respondent have been acting in collusion for the purpose of obtaining a decree of nullity of marriage. 2. That on the 21st of June, 1866, the petitioner and respondent, being capable of contracting marriage, were lawfully married by licence at the registry office for the district of the city of London. 3. That the said marriage was not procured by fraud upon the petitioner as in the fifth paragraph of her petition alleged. 4. That the said petitioner intended to and did contract a lawful marriage by the ceremony observed as above alleged, and was not ignorant of the effect thereof. 5. That the petitioner and respondent cohabited as husband and wife, and that the said marriage was consummated, and is good in law. 6. That at the time of the said marriage the petitioner and respondent were domiciled in England, and were not domiciled in the kingdom of Portugal. 7. That the petitioner and respondent intended at the time of the said marriage to live together as man and wife in England, and did so live for six years; that the validity of the said marriage is to be determined by the law of England. He prayed the Court to dismiss the petition, and pronounce for the validity of the marriage. As regards the charge of collusion, the particulars filed were that the petitioner and respondent agreed and combined together to have a petition for a decree of nullity of marriage presented, and to have divers facts

alleged and proved under the petition which were untrue to the knowledge of them both, and agreed that the petition should set up a sham case herein.

The evidence in the case was chiefly taken in Portugal on commission, and the following facts were proved: that the petitioner and respondent were both born at Oporto, in Portugal, the latter in 1850, and the former in 1851, and were first cousins; that they were, and are, Roman Catholics, and domiciled Portuguese subjects. That in the year 1858 the petitioner, her father and mother, and her uncle De Barros and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. De Barros died in London in 1870, and his son, the respondent, returned to Portugal in 1874, having inherited some landed property at Alto Douro, in Portugal. The petitioner returned to Portugal in January, 1873, and her father was removed there in a state of imbecility in September, 1874.

On the 21st of June, 1866, the petitioner, at that time of the age of fourteen and a half years, and respondent sixteen years of age, were married in the registrar's office of the city of London, in the presence of the mother of the petitioner and the father of the respondent and the grandmother of both parties. No religious ceremony accompanied or followed such marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business. The marriage was never recognized by the respondent or by the friends and relations of either party. It appeared, from the

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evidence of advocates acquainted with the law of Portugal that, as at the time of marriage the petitioner and respondent were natives of Portugal and Portuguese subjects and domiciled there, and were natural and lawful first cousins, the marriage was null and void, because, by the law of Portugal, first cousins are incapable of contracting marriage on account of consanguinity, and such marriage would be held by such law to be incestuous, and therefore that the petitioner and respondent were incapable of contracting a valid marriage either in Portugal or elsewhere.

July 5, 1876. *Inderwick, Q.C., Dr. Tristram,* and *Bayford,* appeared for the petitioner.

Feb. 27. *Willis, Q.C.,* and *Jacques,* for the Queen's Proctor.

[The cases referred to were *Dalrymple* v. *Dalrymple* (1); *Harford* v. *Morris* (2); *Countess of Portsmouth* v. *Earl of Portsmouth* (3); *Hall* v. *Hall* (4); *Compton* v. *Bearcroft* (5); *Steele* v. *Braddell* (6); *Mette* v. *Mette* (7); *Simonin* v. *Mallac* (8); *Brook* v. *Brook.* (9)]

Cur. adv. vult.

March 17. SIR R. PHILLIMORE. The marriage in this case took place on the 21st of June, 1866, at the registrar's office in the city of London district, between Gonzalo Lobo Pereira Caldos de Barros the younger, and Ignacia Clara Maxima Pacheco Pereira Pamplona da Cunha Sottomayor. On the 18th of November, 1874, the wife filed a petition praying that the marriage might be decreed null and void by reason of consanguinity between the parties. On the 5th of July, 1876, the case came before the Court for hearing. A witness was examined orally, and the evidence of witnesses taken under a commission was read. An appearance had been entered on behalf of the respondent, but he had not pleaded, and counsel were heard on behalf of the petitioner only. Taking into consideration the peculiar circumstances of the case, which I am about to state, I thought it

(1) 2 Hagg. Cons. 54, 104.
(2) 2 Hagg. Cons. 423.
(3) 1 Hagg. Eccl. 355.
(4) 15 Jur. 710.
(5) 2 Hagg. Cons. 444, n.
(6) Milw. Ir. Eccl. Reps. 21.
(7) 1 Sw. & Tr. 416; 28 L. J. (P. M & A.) 117.
(8) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.
(9) 9 H. L. C. 217.

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expedient that the averments in the petition should be enlarged so as to enable the Court to consider whether there was not ground for a decree of nullity, first, by reason of the incapacity of the parties to contract marriage in 1866; secondly, by reason of fraud, as shewn by the evidence already laid before the Court; and, thirdly, by reason of the petitioner's want of intention to contract a marriage, and of her ignorance of the effect of the ceremony, as shewn by the evidence before the Court. The amended petition has been duly served upon the respondent, and I, moreover, thought it right that her Majesty's Proctor should be requested to intervene in this case; and I have reheard it, with the advantage of an able argument of Mr. Willis, who represented the Queen's Proctor.

At the time of the marriage the wife was of the age of fourteen years and five months, and the husband of the age of sixteen years. Their parents, who came to this country in 1858, were Portuguese subjects, and had not, in my judgment, looking to all the circumstances of the case, lost their original Portuguese domicile. The parties to the marriage were first cousins. The father of the lady was insane. The marriage was promoted by her mother and by her uncle, the father of her husband. It was presumed, erroneously as it turned out, that the marriage would have the effect of relieving the commercial property of the insane father from certain pecuniary embarrassments. The girl most reluctantly consented to the marriage, yielding at last to the entreaties of her mother, and the assurances that the marriage, being contracted before a civil officer in England, and being illegal by reason of consanguinity in Portugal, would have no binding effect. The marriage was never consummated, and the parties lived exactly in the same relations and without any change of name, or any cohabitation whatever, as they had done before the marriage was contracted. The mother returned to Portugal towards the end of the year 1872, and was joined by her daughter in January, 1873, who is now dwelling in her parents' house in Lisbon.

Looking at all these circumstances, I think it is not improper to say that this is a marriage which the Court would not be reluctant to pronounce invalid, but I must be on my guard against

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taking any other view than a strictly legal one of the unfortunate relationship in which these parties have been placed by their own acts. The boy and girl were both of marriageable age by the law of this country, and, I believe, also by that of Portugal. I am satisfied on the evidence that the marriage was not brought about by what the law would consider coercion of the girl's mother or her relations; and that she perfectly understood that she was about to contract a marriage appears from the great reluctance and distress with which she alleges she consented to it; nor can it vitiate the contract that she had an erroneous view of its future consequences. It cannot, therefore, be set aside on the ground of incapacity of age or coercion or fraud, and this, I may say, was at the last hearing admitted by her counsel.

There remains a very serious question, and one in some measure primæ impressionis, namely, whether the marriage can be pronounced invalid in foro contractûs, that is, in an English Court by reason of its being treated by the law of the domicile of the parties as void on the ground of their consanguinity. The Portuguese advocate who has been examined says that the marriage was null and void, because, according to the laws in force in Portugal at the time of the said marriage and now, first cousins are incapable of contracting marriage on account of consanguinity, and any such marriage is holden by the said law of Portugal to be incestuous, and therefore, that the petitioner and respondent were incapable of contracting a valid marriage, whether in Portugal or elsewhere. I must add to this statement of the law that which is a matter publici juris (so to speak), namely, that marriages between first cousins in Roman Catholic countries are capable of being, and not unfrequently are, rendered valid by a papal or episcopal dispensation. This marriage cannot be pronounced invalid because it is incestuous according to the general law of Christendom; it is not a marriage between persons in the direct lineal line of consanguinity, or in the collateral line within the degree of brother and sister, both which classes of marriage are by the usage and practice of Christian states, and the general current of Christian law and authority, considered as incestuous, unnatural, and destructive of civilized life (Story, Conflict of Laws, § 114), and so considered by laws "quæ humano generi universo sunt datæ" (Grotius de

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Bello et Pace, l. 2, c. 5, s. 13, § 2). I must also bear in mind the observations of Lord Cranworth in *Brook* v. *Brook*. (1) The prohibition of marriage between first cousins cannot be put upon this basis, or upon higher ground than that of a prohibition by the positive law of the country of the domicile. The objection of consanguinity in this case, being removable by a papal or episcopal dispensation, is of the nature of what the canonists call an impedimentum impeditivum, and not an impedimentum dirimens.

I have considered all the judgments which have been given in this country upon the much vexed subject of foreign marriages. The decided cases establish the doctrine that the Court of the domicile recognizes certain incapacities, affixed by the law of the domicile, as invalidating a marriage between parties belonging to that domicile in a foreign state in which such marriage is lawful. But the decided cases do not establish the converse doctrine that the Court of the place of the contract of marriage is bound to recognize the incapacities affixed by the law of the domicile on the parties to the contract, when those incapacities do not exist according to the lex loci contractûs. It may appear that according to the jus gentium the latter proposition is a consequence of the former; and I remember addressing such an argument to the full Court of Divorce in the case of *Simonin* v. *Mallac* (2), but in vain. In that case the parties were French subjects, and came to England for the purpose of evading the French law, and having been married by licence, returned to Paris the day after the marriage. A French tribunal pronounced a decree of nullity against the marriage, on the ground that it had been celebrated without the consent of parents, and without the precedent publications required by the code. Application was made to the English Court to pronounce a decree of nullity on the ground of the incapacity of the parties according to the law of their origin and domicile, and this appeared to me to be a case in which the English tribunal, according to the jus gentium, ought to respect the French law, and also pronounce a decree of nullity, but it refused to do so in a very elaborate and careful judgment delivered by Sir C. Cresswell on behalf of the full Court. It was a case primæ impressionis. The Court said (p. 80), "It is very remarkable that neither in the

(1) 9 H. L. C. 226. (2) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.

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writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the propositon that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold it void, because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced even in the case of marriages deemed to be incestuous." It was, I think, not quite correct to say "that no suggestion was offered," but in other respects the statement is perfectly accurate. The Court then relied a good deal upon the authority of Huber (Prælectiones Juris Civilis, lib. i. tit. 3 De conflictu legum) for the general law that marriages valid according to the lex loci contractûs are valid everywhere, though the same writer (as they were aware, for they cited the passage) excepted from the operation of this principle incestuous marriages, and marriages by minors, and thought that other nations ought to refuse to acknowledge the validity of such marriages. "Multoque magis statuendum est, eos contrà jus gentium facere videri, qui civibus alieni imperii suâ facilitate jus patriæ legibus contrarium scientes volentes impertiuntur."

It is true that in that case the objection to the marriage was of a very different character from what is presented in the case before me, and that Lord Campbell, when the case of *Brook* v. *Brook* (1) was argued before the House of Lords, dwelt strongly on the fact that the objections in *Simonin* v. *Mallac* (2), derived from the French law, related to matters of form. After mentioning the facts of the case, that learned lord said: "Sir C. Cresswell, after the case had been learnedly argued on both sides, discharged the petition. But was there here anything inconsistent with the opinion which the same learned judge delivered as assessor to Vice-Chancellor Stuart in *Brook* v. *Brook* (3)? Nothing whatever, for the objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoléon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled,

(1) 9 H. L. C. 217. (2) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97. (3) 3 Sm. & G. 481.

forbidding a conjugal union between them, and if the proper forms of celebration had been observed, the marriage, by the law of France, would have been unimpeachable. The case, therefore, comes into the same category as *Compton* v. *Bearcroft* (1) and *Steele* v. *Braddell*, decided by Dr. Radcliffe. (2) None of those cases can shew the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not by any forms or consents have been rendered valid in the country in which the parties were domiciled." These are certainly strong dicta from a high authority, from which an inference might be drawn that in the case of a marriage incestuous by the laws of the domicile, the Court of the loci contractûs might, in the opinion of Lord Campbell, be justified in setting aside the marriage on the ground of the incapacity of the parties to contract it.

If this important question were not embarrassed by precedents of former decisions, and especially by the judgment on *Simonin* v. *Mallac* (3), I might have been inclined to hold that the jus gentium would require the lex fori, which is also the lex loci contractûs, to adopt for the occasion as its own law the lex domicilii, as in an analogous case, that of *Dalrymple* v. *Dalrymple* (4), Lord Stowell speaks of the law of England, withdrawing altogether and leaving the legal question to the exclusive judgment of the law of the foreign country. But having regard to the decisions upon this subject, and especially to that of *Simonin* v. *Mallac* (3), I do not think that sitting as a single judge in an English Court, I ought to pronounce this marriage contracted in England, and valid by English law, to be null, and I must decline to do so. I dismiss the petition.

Solicitors for petitioner: *Tamplin, Taylor, & Joseph.*
Solicitor for respondent: *J. P. Poncione*

(1) 2 Hagg. Cons. 444, n.
(2) Milw. Ir. Eccl. Reps. 21.
(3) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.
(4) 2 Hagg. Cons. 54.

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April 10.

JEFFERS *v.* JEFFERS.

Suit for Dissolution—Application to dispense with making Co-Respondents—Practice—Rules 4, 5, 6, *Rules and Regulations*, 1866.

An application to dispense with making a co-respondent should be made at an early stage of the suit; but, except under special circumstances, it will be allowed even after the respondent has filed her answer to the petition.

This was a suit for dissolution of marriage instituted by Richard Jeffers against his wife, Elizabeth Ellison Jeffers by reason of her adultery. The petition, which was dated the 10th of March, 1877, and was served personally on the respondent, together with the citation, on the 12th of March, 1877, alleged that the respondent is leading a life of prostitution, and had committed adultery on the 20th of January, 1877, and the 19th of February, 1877, at places mentioned in the petition, with men whose names are unknown to the petitioner. On the 20th of March the respondent entered an appearance to the citation, and on the 4th of April instant she filed an answer denying the charges of adultery contained in the petition.

Upon the usual affidavits that the petitioner and his solicitor were unable to obtain the names of the men who were in company with the respondent at the times mentioned in the petition,

Searle moved the Court to allow the petitioner to proceed without making a co-respondent.

Tarring, for the respondent, opposed the motion as too late. As the respondent has answered the petition, the petitioner cannot now make such an application, except on filing a new petition. [He referred to *Tollemache* v. *Tollemache* (1); *Carryer* v. *Carryer and Watson* (2); *Pitt* v. *Pitt*. (3)]

The Judge Ordinary. I am of opinion that the rules referred to (Rules and Regulations, 1866, paragraphs 4, 5, 6), which regulate this matter, do not require that the application should be made at any particular period of the suit, but no doubt it is right

(1) 28 L. J. (P. M. & A.) 2. (2) 4 Sw. & Tr. 94; 34 L. J. (P. M. & A.) 47.
(3) Law Rep. 1 P. & M. 464.

(2 Sc 11 Jur NS. 352

that it should be made at an early stage and as speedily as possible. Under certain circumstances I might refuse to dispense with a co-respondent if the application were made late in the cause; if, for instance, it could be shewn that at an earlier period the name of the co-respondent might have been got at, and that it is only by reason of a change of circumstances that it cannot afterwards be found out. In this case there is no reason why I should not dispense with making a co-respondent. No special grounds are alleged by the respondent why I should refuse the application, and I shall, therefore, grant it.

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Solicitor for petitioner: *J. B. Ottley.*
Solicitor for respondent: *J. Frankland.*

SLY *v.* SLY AND DREDGE.

Feb. 6.

Lost Will—Copy—Evidence.

Declarations of a deceased person, who has been in possession of property claiming a limited interest therein under a particular will, are admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein. And where a copy of such will, the original not being forthcoming, is found in the possession or amongst the papers of the legal adviser of one of such executors, it is evidence of the contents of such will, and may be admitted as such.

THE plaintiff, Elizabeth Sly, as the universal legatee substituted in the last will and testament of Mary Sly, deceased, propounded a copy of such will, which was dated July, 1826, and in which Richard Howe and John Daniel were appointed executors. The defendants, the parties interested under an intestacy, did not appear or contest the suit.

Jan. 11. *Inderwick, Q.C.*, and *Searle*, appeared for the plaintiff.

Cur. adv. vult.

Feb. 6. SIR J. HANNEN (President). In this case Elizabeth Sly propounded the will of Mary Sly, deceased, alleged to have been duly executed and attested in July, 1826, whereby the deceased appointed Richard Howe and John Daniel executors.

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Elizabeth Sly, the plaintiff, claimed to be the universal legatee substituted in the said will of Mary Sly, and to have administration granted to her, with a copy of the said will annexed, the original having been lost. It was proved that William Dredge, the father of one of the defendants, was in possession of property which formerly belonged to the deceased, and that in the year 1836 he, with his wife Mary Dredge, joined in a deed by which a loan was raised upon the security of Mary Dredge's life interest in the property in question, stated in the deed to be derived from the will of Mary Sly, deceased, of which Richard Howe and John Daniel were executors. The defendant Dredge had remained in possession of the property after the death of his father and mother. The original will was never proved, nor could it be found after due search made for it, but a document purporting to be a copy was offered in evidence, and the question is, whether it is admissible. The copy was found amongst the papers of a Mr. Goodman, a solicitor, deceased, of whom John Daniel also deceased was a client. It was in a bundle of papers relating to Daniel's affairs, one of them being a memorandum apparently of answers made in February, 1838, by Daniel to inquiries concerning various documents. One entry in the memorandum in the handwriting of Daniel was as follows: "1826. The will of Mary Sly?—Yes." The books of Goodman could not be found, he having become a bankrupt, and many of his papers having been burnt. The copy will was traced to the custody of Mr. Goodman's assignees. The copy is in the handwriting of one John Symes, deceased, who was formerly a clerk in the employment of Goodman, and is indorsed "Copy will of Mary Sly," and John Symes' name appears in the copy as that of one of the attesting witnesses. The other attesting witness cannot be found. The solicitor who prepared the deed of 1836 stated that he has no doubt that he saw the original will at the time, though he does not recollect its contents.

In these circumstances I am of opinion that the alleged copy is admissible in evidence. The statement contained in the deed of 1836, being one made by a deceased person in possession of the property, in disparagement of his own title by limiting it to a life estate, is admissible, not only as against persons claiming through him, but also for strangers; and the statement that he took the

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life interest under a particular will seems one equally admissible, for it is a further limitation of his interest. It is as though the declarant had said, "I claim no other interest than the life estate which I can shew I take under the will of Mary Sly." The case is similar to that of an occupier of land whose declaration has been received to shew the name of the landlord under whom he held: *Peaceable* v. *Watson*. (1) This evidence, therefore, establishes that there was a will of Mary Sly, of which Richard Howe and John Daniel were executors. This at once points to Daniel's custody as a proper quarter in which to seek for a copy of the will of the deceased, search having been made in vain for the original in every place that can be suggested for its proper or probable place of deposit. It would be natural and reasonable that a copy should be made for the executor, and that it should be preserved and kept by his solicitor for the client's use and guidance (the original probably having been retained by the tenant for life as evidence of his interest in the realty). With regard to the copy tendered in evidence, it is accompanied by every mark of authenticity; it is made by a person who represents himself to have been one of the attesting witnesses; it is made by an attorney's clerk, presumably in the course of his business as such clerk, since it is found in his employer's custody amongst his client's papers after a lapse of fifty years. It may be added that another copy, indorsed with the name of Mr. Goodman's firm, was also found in the custody of the heir of the person taking, in the events which have happened, the reversion in the property left by the will to Ann Dredge for life; but this, though it corroborates the evidence afforded by the copy found amongst the papers of Mr. Daniel, does not affect the question of its admissibility. I pronounce for the will as contained in the draft or copy filed by the plaintiff on the 15th of May, 1875.

Solicitors: *Taylor, Hoare, & Co.*

(1) 4 Taunt. 16.

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Feb. 20.

IN THE GOODS OF LACROIX.

Holograph Will—Valid according to the Law of the Place where made—Incorporation—24 & 25 Vict. c. 114, *s.* 1.

The deceased, a Frenchman by birth, but naturalized in England, executed at Paris a will and codicil in the English form relating to his property in England only, and a holograph will, signed and dated, disposing of his property in France, but referring directly to the English will. He died at Paris:—

Held, that if it could be shewn that the will and codicil in the English form were made in a form permitted by the law of France in the case of British subjects resident in France, they could be admitted to probate under 24 & 25 Vict. c. 114, s. 1, as valid according to the law of the place where made.

EUGÈNE LEGUEN DE LACROIX, a natural born French subject, died at Paris on the 15th of April, 1876. On the 9th of October, 1845, he obtained a certificate of naturalization in this country, which was duly enrolled in the High Court of Chancery in accordance with the provisions of the statute 7 & 8 Vict. c. 66, under which the certificate was granted. He subsequently returned to France, and in the year 1874, being at the time resident at Paris, he executed a will bearing date the 4th of June, 1874, in the English form, and attested as required by the English law, and two codicils dated respectively the 9th and 15th of June, 1874. By these testamentary papers he disposed of his property in England only. On the 26th of December, 1874, being still resident in Paris, he made a holograph will in the French form and language, of which the following is a translation: "Desirous of acknowledging the great kindness my wife, Jenny Louise Blackner, has shewn me, especially since my sad illness, I bequeath in her favour, and give her the enjoyment for life of my moiety of our house in the Rue Duperre, at St. Servan, as well as the furniture, plate, linen, pictures, carriages, horses, wine-cellar, and generally of all the furniture and everything contained in or about the same, so that she may live therein peacefully, and without being troubled or disturbed; this she will be enabled to do with the share I have given her out of my property in England by my wills of the 4th, 9th, and 15th of June, 1874. May God protect her in this world, as also my son Eugène, even as I bless them on leaving it.

(Signed) "Eugène Leguen de Lacroix.

"Paris, 26th day of December, 1874."

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According to the affidavit of an advocate of the Court of Appeal of Paris, it would seem that the English will and codicils would be upheld and carried into execution by the Courts in France, as being the will and codicils of an English subject made in accordance with the requirements of the law of his nationality, and that the will in the French language dated the 26th of December, 1874, is made in conformity with and is valid by the laws and constitution of the French Republic.

Feb. 6. *Searle* moved for probate of the holograph will, as also of the English will and codicils. Under the statute 24 & 25 Vict. c. 114, s. 1, the holograph will is well executed according to the forms required by the laws of the place where the same was made; and as it contains a direct reference to the English will and codicils, it incorporates them, and the whole will be admitted to probate.

[SIR J. HANNEN referred to the case of *Pechell* v. *Hilderley* (1), in which it was stated that a holograph will, under the Code Civil, must be a complete instrument in itself, and could not incorporate any other document.]

In that case the documents before the Court were not valid either by the law of this country or by the law of Italy, where the one of later date was written. In this case the holograph will is valid by the law of France, and therefore is entitled to be admitted to probate in this country, and as it is incomplete without the English will and codicils, to which it distinctly refers, the Court will grant probate of all these documents so that there may be a complete will.

Cur. adv. vult.

Feb. 20. SIR J. HANNEN (President.) The deceased in this case, a naturalized British subject, made at Paris a will, dated the 4th of June, 1874. On the 9th of June, 1874, he executed a codicil to this will, and on the 15th of June, 1874, he made a second codicil, apparently for the sole purpose of correcting an omission in the first codicil. These three instruments were duly executed according to the requirements of the English law, or

(1) Law Rep. 1 P. & M. 673.

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rather, I should say, were executed in the form required for English wills. On the 26th of December, 1874, he also at Paris executed a holograph testamentary instrument in the French form, and by it he confirmed his will of the 4th, 9th, and 15th of June, 1874. Application was made to me to admit to probate all these several documents. It appears from the affidavit of a French advocate that the instruments of the 4th and 15th of June, 1874, are a good and valid will and codicil, which would be upheld and carried into execution by the French Courts, as being the will and codicil of a British subject, made in accordance with the requirements of the law of his nationality. I have quoted the exact words of the affidavit. This assumes, however, that the will and codicil were made in accordance with the requirements of the law of England, but they were not so made unless they were made in the form required by the law of France, or unless they were made in the form required by the law of the place of the deceased's domicile at the time when made. It does not appear what the deceased's domicile was, but it is rather to be inferred it was French. It is possible, however, that the French advocate may mean that the will and codicil are made according to the form permitted by the law of France, in the case of a British subject making his will in France; and if evidence can be offered to the Court that by the law of France it is permitted to a foreigner in France to make his will according to the form required by the law of his country as to the execution of wills there, and that a will so made would be deemed by the French Courts to be good and valid, and would be carried into execution by them, this application may be renewed, as it would then appear that the will of the 4th of June, 1874, and the codicil of the 15th of June, 1874, were valid, as having been made in the form permitted by the law of France in the case of British subjects in France. The same advocate further deposed that the will of the 26th of December, 1874, is made in conformity with the requirements of the French law, and is valid by the laws of France. If the evidence I have suggested can be obtained, it will be open to the applicant to contend, and I think successfully, that all the documents referred to are made in accordance with the form required by the law of the place where they were made, and must therefore be held to be well executed

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for the purpose of being admitted to probate in England under 24 & 25 Vict. c. 114. The case of *Pechell* v. *Hilderley* (1), to which I referred when the motion was made, is not an authority against my granting the application. That case turned on the application of Italian law to the instruments then in question. In the present case I must be guided by what may be shewn by a competent person to be the French law, and it will be unnecessary to consider whether, if the law of France were proved to be similar to the law of Italy as stated in the evidence before the Court in that case, it would prevent my granting the application. The case must stand over for further evidence.

April 10. *Searle* renewed the application on a further affidavit from the advocate of the Court of Appeal of Paris, to the following effect; (1.) that by the law of France a will of a naturalized British subject made in France according to the forms required by the law of England to give validity to wills executed by Englishmen in England is valid, and would be carried into execution by the French Courts, whatever may be the domicile of the testator at the time of making such will, or at the time of his death. (2.) That, assuming the deceased Lacroix, being a Frenchman by birth, afterwards became a naturalized British subject, and subsequently to the date of such naturalization as a British subject returned to France, and in France executed a will according to the form required by the law of England to give validity to wills executed by Englishmen in England, such will is valid by the law of France, and would be carried into execution by the Courts of France, whatever may have been the domicile of the deceased at the time of making the same, or at the time of his death.

SIR J. HANNEN (President) granted probate of the English will and codicil bearing date respectively, the 4th of June, 1874, and the 15th of June, 1874.

Solicitors: *Ridsdale, Craddock, & Ridsdale.*

(1) Law Rep. 1 P. & M. 673.

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DEMPSEY *v.* LAWSON AND LAWSON.

Will—No Residuary nor Revocatory Clauses—Earlier Will disposing of the whole of the Property—Incorporation.

5 PD 109
11a. 1,

The deceased executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced "this is the last will and testament of me," &c. It varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses:—

Held, that, from the general tenor of the last will, it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked.

ELIZABETH, Baroness Stafford, late of Hornby Castle, Yorkshire, widow, died on the 29th of October, 1862. On the 26th of August, 1858, she duly executed a will, in which she appointed her nephew Charles Carroll McTavish, Oliver O'Donnell, and McHenry, grandson of Colonel J. E. Howard, executors as to her real estate and ground rents in the United States of America, and Sir William Lawson, Bart., John Lawson, and Thomas Paulinus Lawson, executors in this country. In this will the testatrix, after referring to the powers given to her under her grandfather's (Mr. Carroll, of Carollton, in the United States) will, and that of her mother, Mrs. Caton, of Maryland, and expressing her desire to execute the powers so vested in her, and to dispose of all her real and personal estate and property whatsoever and wheresoever, proceeds to dispose of certain portion of her real estate in America in favour of some Roman Catholic ecclesiastics and institutions, and the remainder of such estates she bequeaths, through the medium of trustees, for the benefit of her sister, the Duchess of Leeds, and Mrs. McTavish, and for the children of the latter. She then leaves all her personal estate, not otherwise bequeathed, to Sir William Lawson, of Brough Hall, Yorkshire, and to his sons John Lawson and Thomas Paulinus Lawson, their executors, administrators, and assigns, in trust to pay debts, funeral and testamentary expenses, and to appropriate out of such parts of her residuary personal estate as may by law be applied to charitable purposes, such stocks, funds, securities, shares, or other property as will yield an income sufficient for paying a perpetual

annuity of 100*l.* to the Right Reverend Thomas Grant, D.D., of St. George's Roman Catholic Church, Southwark, Roman Catholic bishop, and his successors, Roman Catholic bishops, performing the duties or chief duties now performed by the said Thomas Grant as such Roman Catholic bishop, and to vary the investments from time to time with the consents of the said Dr. Grant and his successors, and to pay the dividends, &c., to the said Dr. Grant and his successors for ever, for his and their support and maintenance. In the third place, to appropriate out of the residuary personal estate such stocks, &c., as will yield an income sufficient for paying the several annuities set out in the will, annuities principally to old servants of her own or her sister's. In the fourth place, to raise a clear legacy or sum of 3000*l.* at the expiration of six months from her decease, and to pay the same to her step-son Lord Stafford. Lastly, to continue the clear surplus of the residuary personal estate in its actual state of investment, or to alter or vary the same with the consent of the Duchess of Leeds during her life, and afterwards in the absolute discretion of the trustees, and to pay the interest, dividends, and annual produce arising from the same, as well as the surplus of the interest, dividends, and annual produce to arise from the stocks, &c., before directed to be appropriated for the purpose of meeting the several annuities before mentioned, after paying such annuities, to her sister, the Duchess of Leeds, for her separate use, and after her decease to her sister, Mrs. McTavish, for her life, and after the death of the survivor upon trust as to such portions of the said residuary personal estate as may by law be bequeathed to charitable purposes, and the stocks, funds, and securities upon which the same may have been invested upon trust as to one third part thereof to pay or assign, transfer and apply the same to or for the benefit of the Roman Catholic Convent of the Sisters of Mercy at Bermondsey, in the county of Surrey, for ever, and as to one other third part thereof, to pay, assign, transfer, and apply the same to or for the benefit of the Roman Catholic Convent of at Richmond, in the county of York, for ever, and as to the remaining third part thereof, to pay, assign, transfer, and apply the same to or for the benefit of the Roman Catholic Convent of the Annunciation, called the Sisters of the Good Shepherd, at Hammersmith,

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in the county of Middlesex, for ever, for the respective charitable purposes of the said institutions respectively. And as to any parts of the said residuary personal estate which could not by law be bequeathed to charitable purposes, and also as to any part of the residuary estate before bequeathed the trusts of which shall on any account fail or be or become invalid or incapable of taking effect, the testatrix gave the same to her sisters, their heirs, executors, and assigns, for their use and benefit as joint tenants, and as to the Duchess of Leeds for her separate use.

On the 5th of December, 1860, the testatrix executed another will, which commenced, "In the name of God. Amen. This is the last will and testament of me, Elizabeth Stafford, the widow of George William, Lord Stafford, a peer of Great Britain, and one of the daughters of Richard and Mary Caton, of Baltimore, in Maryland, in the United States of America, now residing in London." By this will she gave to Basil R. Spalding, Esq, of Charles Street, in the city of Baltimore, in the state of Maryland, all her lands, ground rents, and real estate in the United States of America, whatsoever, wheresoever, and howsoever, in trust for the benefit of her sisters, the Duchess of Leeds, and Mrs. McTavish, and the two sons of the latter and their children. The bequests to charitable institutions in America contained in the first will were omitted, and certain annuities made payable out of ground rents in the city of Baltimore in the first will were charged on her farms and lands in Frederick County, Maryland, by this last will. Mr. Spalding is appointed executor for all matters and things in the United States of America. The testatrix then continues: "I give and bequeath to Sir William Lawson, Bart., and his two sons, John and Thomas Lawson, all my Baltimore and Ohio Railroad shares, all my Spanish stocks and certificates, and all other shares and stocks I may be possessed of or entitled to at the time of my death, whatsoever, wheresoever, and howsoever in trust for the following purposes:" (namely, to pay debts, testamentary and funeral expenses, a sum of 3000*l.* to her step-son, the present Lord Stafford, and certain annuities therein mentioned). "All the residue of income from the above stocks and shares, after paying the annuities above-mentioned, I bequeath equally between my two sisters, the Duchess of Leeds and Mrs. Emily McTavish,

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during their lives. If the Duchess survives Mrs. McTavish, then I give to her the whole income for her life. At the death of both my sisters I leave one half of all the said stocks and shares whatsoever and wheresoever to the children of Charles Carroll McTavish, my nephew. I leave the portions of the female children to their sole and separate use, free from the control of their husbands and liability for their debts, and the shares of the sons to be given to them on their attaining the age of twenty-one. The other half the said stocks and shares I request Sir William and his sons to hold for the following charities, or to secure the funds to them for the use of his country, and not to be diverted to any foreign charitable institutions. I request my trustees to appropriate one fourth of the above sum to the establishment of the order of the Sisters of Charity in London in concert with Lady Georgiana Fullarton, if she be living, or to the establishment she shall have founded; one fourth to the Good Shepherd at Hammersmith; one fourth to the Priory of Our Lady of Peace at Richmond, in Yorkshire; one eighth to a fund for aged and infirm Roman Catholic priests in England, and one eighth for the education of poor Roman Catholic children. I appoint Sir William Lawson, and his son John Lawson, Esq., and Thomas Lawson, Esq., executors of this my last will and testament for all matters and things in England, and in respect of all my shares, funds, and stocks, &c., wheresoever and howsoever."

On the 18th of June, 1862, the testatrix executed a codicil to this last will, and thereby confirmed it. On the 24th of March, 1863, probate of this will and codicil was granted to Sir William Lawson, Bart. (since deceased), and his two sons, John and Thomas Paulinus Lawson, the executors therein named; and on the 10th of January, 1876, a writ of summons was taken out by the plaintiff, Catherine Anne Dempsey, the superioress of the Roman Catholic Convent of the Sisters of Mercy at Bermondsey, one of the residuary legatees named in the will of the deceased, dated the 26th of August, 1858, calling upon the defendants to bring in the probate of the will and codicil of the deceased granted to them on the 24th of March, 1863, in order to its being revoked, and claiming that probate be granted of the will of the 26th of August, 1858, together with the will of the 5th of December, 1860, and the codicil thereto, dated the 18th of June, 1862, as

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forming together the last will and testament of the deceased. A statement of claim was subsequently filed by the plaintiff, propounding these several papers, and the defendants filed a statement of defence, alleging that the will of the 26th of August, 1858, was revoked by the execution of the subsequent will of the 5th of December, 1860, and that that will and its codicil are alone entitled to be admitted to probate. Issue having been joined, the question in dispute came on for decision before the President, without a jury. At the hearing it was proved that at the death of Lady Stafford a sum of 8987*l.* 4*s.* 6*d.* stood to her credit at Messrs. Rothschild's, being the proceeds of the sale of some Spanish certificates sold by her directions on the 30th of June, 1862, and further sums of 438*l.* 16*s.* 8*d.* and 187*l.* 4*s.* 6*d.* at other banks, and also that a sum of 50*l.* 12*s.* 2*d.* was due to her at the time of her death in respect of her jointure. These several sums were not disposed of by the will and codicil, which had been proved by the defendants.

Jan. 11. *Inderwick, Q.C.*, and *Searle*, appeared for the plaintiff. As there is no clause of revocation in the will of December, 1860, and the residue is not disposed of by that will, there is no reason why the will of August, 1858, should not be included in the probate. If the earlier will is revoked the deceased died intestate as to a considerable portion of her personal estate.

Dr. Spinks, Q.C., *Bayford*, and *Williamson*, for the defendants. It is clear from the contents of the will of December, 1860, that the testatrix intended thereby to revoke the earlier will. The Court cannot insert a revocatory clause in a will, neither can it introduce a clause disposing of the general residue.

[The cases referred to were: *In the Goods of Leese* (1); *In the Goods of Graham* (2); *Geaves* v. *Price* (3); *Birks* v. *Birks* (4); *In the Goods of Meredith* (5); *In the Goods of Joys* (6); *Lemage* v. *Goodban* (7); *In the Goods of Fenwick* (8); *In the Goods of Griffith* (9); *In the Goods of Petchell.* (10)]

Cur. adv. vult.

(1) 2 Sw. & Tr. 442.
(2) 3 Sw. & Tr. 69; 32 L. J. (P. M. & A.) 113.
(3) 3 Sw. & Tr. 71; 32 L. J. (P. M. & A.) 113.
(4) 4 Sw. & Tr. 23; 34 L. J. (P. M. & A.) 90.
(5) 29 L. J. (P. M. & A.) 155.
(6) 30 L. J. (P. M. & A.) 169.
(7) Law Rep. 1 P. & M. 57.
(8) Law Rep. 1 P. & M. 319.
(9) Law Rep. 2 P. & M. 457.
(10) Law Rep. 3 P. & M. 153.

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Feb. 20. SIR J. HANNEN, President. The testatrix, Elizabeth, Baroness Stafford, died on the 29th of October, 1862, and on the 24th of March, 1863, her will, bearing date the 5th of December, 1860, and a codicil thereto, dated the 18th of June, 1862, were proved in common form. In January, 1876, this action was commenced in which the plaintiff propounds an earlier will of the 26th of August, 1858, wherein the testatrix appointed the Roman Catholic Convent of the Sisters of Mercy, at Bermondsey, one of the residuary legatees, of which convent the plaintiff is superioress; and she claims that probate be granted of the said will with that of December, 1860, together with the codicil of June, 1862, as forming together the last will and testament of the deceased. By the will of 1858 the testatrix, after disposing of certain real and personal property in the United States, bequeaths all her personal estate, not before bequeathed, to Sir W. Lawson and his sons John and Thomas, in trust, first to pay debts, funeral and testamentary expenses; secondly, to pay a perpetual annuity of £100 a year to Dr. Grant and his successors, Roman Catholic bishops; thirdly, to pay certain annuities in the will mentioned; fourthly, to raise and pay a sum of £3000 to her step-son Lord Stafford; fifthly, to pay the interest arising from the residue to her sister the Duchess of Leeds for life, and after her decease to her sister Emily McTavish for life; and after the death of the survivor, as to one third, to apply the same for the benefit of the Roman Catholic Convent of the Sisters of Mercy, at Bermondsey, for ever; as to one other third part, for the benefit of the Roman Catholic Convent of , at Richmond, in Yorkshire; and as to the remaining third, for the benefit of the Roman Catholic Convent of the Good Shepherd, at Hammersmith; and as to any parts of her residuary estate which could not by law be bequeathed to charitable purposes, or as to which her bequests might fail, she bequeathed the same to the Duchess of Leeds and Mrs. McTavish absolutely as joint tenants. Lastly, the testatrix left a legacy of £300 to Sir W. Lawson, and appointed him and his two sons executors. By the will of 1860 the testatrix devised to Basil R. Spalding, Esq., of Baltimore, "all her real estate in the United States of America whatsoever, wheresoever and howsoever in trust;" as to certain lands, for the use and benefit of her sister the Duchess of Leeds;

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and various other devises and bequests follow, varying some of the dispositions of the will of 1858 as to the American property, and repeating others, but not mentioning by description all the estates referred to in that will. After appointing Basil R. Spalding executor of her will in all matters and things in the United States of America, the testatrix proceeds as follows: "I give and bequeath to Sir W. Lawson (and his two sons John and Thomas) all my Baltimore and Ohio Railroad shares, all my Spanish stocks and certificates, and all other shares and stocks I may be possessed of or entitled to at the time of my death, whatsoever, wheresoever, and howsoever, in trust for the following purposes": (1st.) to pay debts, &c.; (2ndly.) to raise and pay to Lord Stafford 3000*l.*; (3rdly.) to pay the annuities mentioned in the will, most of them being to the same persons and for the same amounts as in the will of 1858, and, subject thereto, to divide the income between the Duchess of Leeds and Mrs. McTavish, and, at the death of one of them, to pay the whole to the survivor, and at the death of the survivor one half of the said stocks and shares, whatsoever and wheresoever, to the children of Charles C. McTavish, her nephew, and the other half she requested Sir W. Lawson and his sons to hold for the following charities: one fourth to the establishment of the order of the Sisters of Charity, in London, in connection with Lady G. Fullarton, if she be living; or to the establishment she shall have founded; one fourth to the Good Shepherd Convent at Hammersmith; one fourth to the Priory of Our Lady of Peace, at Richmond; one eighth to the fund for aged and infirm Roman Catholic Priests; and one eighth for the education of poor Roman Catholic children. And the will concludes: "I appoint Sir W. Lawson and his sons John and Thomas executors of this my last will and testament for all matters and things in England, and in respect of all my shares, funds and stocks, &c., wheresoever and howsoever."

At the death of Lady Stafford a sum of 8987*l.* 4*s.* 6*d.* stood to her credit at Messrs. Rothschild's, being the proceeds of the sale of some of the Spanish certificates which she held at the date of the will of 1860, and which by her direction had been sold on the 30th of June, 1862. She had not at the time of her death, given any direction as to the re-investment of this money. Beyond this

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amount, Lady Stafford died possessed of two balances at her bankers of 438*l.* 16*s.* 8*d.* and 187*l.* 4*s.* 6*d.* respectively, and 50*l.* due to her in respect of her jointure. The executors and trustees under the deceased's will appear to have acted on the assumption that she died intestate in respect of these several sums; but it is now contended on the part of the plaintiff, that the assumption was incorrect, and that the money in the hands of Messrs. Rothschild and the bankers, and the arrears of the jointure passed under the residuary clause of the will of 1858, on the ground that that clause is not revoked by the will of 1860. Hence this action. It was contended on behalf of the plaintiff, that as the will of 1860 contains no express revocation of the earlier will it was to be construed as revoking only those parts of it with which the later provisions were inconsistent, and that the dispositions of the will of 1860 are not inconsistent with the residuary bequest for the benefit of the three Roman Catholic convents. In support of this contention, Williams on Executors, 6th ed. p. 150, and the cases there cited, were relied on. I assent to the principle expressed in the passage referred to, and I have had occasion to act upon it in the case of *In the Goods of Petchell* (1), but it becomes necessary on the present occasion to consider more minutely the nature and extent of the inconsistency of a later testamentary instrument, which will have the effect of revoking an earlier will. In this investigation the Court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used; but in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty* v. *West.* (2) There the Court held upon all the facts before it, that it was the intention of the testator that the later paper should stand alone,

(1) Law Rep. 3 P. & M. 153. (2) 1 Roberts. Eccl. 264.

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although that disposed of a part only of his personal estate, and therefore that in effect, although not in terms, it revoked the earlier will. The authority of that case has been stated by Sir E. V. Williams, to be doubtful since the decision of the Privy Council in *Cutto* v. *Gilbert* (1), and Lord Penzance is said to have regarded it as overruled. The case of *Cutto* v. *Gilbert* (1) however, merely decides that the bare fact of a testator having executed an instrument as his last will and testament, the contents of which are unknown, does not operate as a revocation of a previous will, and this seems very obvious for the missing instrument may have been confirmatory of the first (See Wms. Executors, p. 156, note c.) It certainly does not appear from the judgment in that case, that there was any intention to overrule the decision in *Plenty* v. *West.* (2) Dr. Lushington (3), says: "Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument for the uniting the papers was, that the whole of the personal estate was not disposed of by the second will. It is true that Sir H. J. Fust, in his judgment, relies upon the fact that the testator called the will of 1838 his last will, but that is only one circumstance in conjunction with others on which he founded his decision." The Judicial Committee thus appear to have approved of the decision in *Plenty* v. *West* (2) upon the ground that the fact that the whole of the personal estate was not disposed of by the second will, was not by itself a sufficient reason for uniting the earlier with the later will, and admitting both to probate, the wills being in other respects essentially different. And Lord Penzance, in *Lemage* v. *Goodban* (4), does not say that *Plenty* v. *West* (2) is overruled; but with his accustomed accuracy, only says, "the case of *Plenty* v. *West* (2), so far as it supports the doctrine that the use of the words 'last will' in a testamentary paper necessarily imports a revocation of all previous instruments, is I think, overruled by *Cutto* v. *Gilbert* (1)." Lord Penzance further says: "The intention of the testator in the matter is the sole guide and control. But the intention to be sought and discovered relates to the disposi-

(1) 9 Moo. P. C. 131.
(2) 1 Roberts. Eccl. 264.
(3) 9 Moo. P. C. at p. 146.
(4) Law Rep. 1 P. & M. 57.

12 Jur. N.S. 32.

tions of the testator's property and not to the form of his will. What dispositions did he intend? not which or what number of papers did he desire or expect to be admitted to probate? is the true question." I followed that decision *In the Goods of Petchell.* (1) In that case I considered that the intention of the testatrix in the second will was to benefit her daughter by postponing the payment of the specific legacies until after the daughter's death, and that no intention appeared to deprive her daughter of the residue after payment of the legacies. I therefore came to the conclusion that the original residuary bequest in her favour was not revoked.

Even if the second instrument contains a general revocatory clause, that is not conclusive, and the Court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: *Denny* v. *Barton.* (2) On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative. Dr. Lushington, in giving the judgment of the Privy Council in *Henfrey* v. *Henfrey* (3), says, "the question is total revocation or partial revocation." And on this question Sir J. Nicoll says, in *Methuen* v. *Methuen* (4), "In the Court of Probate the whole question is one of intention; the animus testandi and the animus revocandi are completely open to investigation in this Court." In the present case I am of opinion that the intention of the testatrix, to be collected from the dispositions of the two wills, is that the second should stand alone, and be in complete substitution for the first, and that it contains all the testamentary dispositions which she intended at that time to constitute her last will and testament, and consequently that it does by implication revoke the whole of the will of 1858.

I think that whole scheme of the will of 1860 shews that it was intended to be a substitution for the will of 1858. I do not think it necessary to state in detail the several passages from which I draw this inference, because I adopt the view of Lord Penzance that the question is what dispositions did the testatrix intend, not which or what number of papers did she desire or

(1) Law Rep. 3 P. & M. 153.
(2) 2 Phillim. 575.
(3) 4 Moo. P. C. 29.
(4) 2 Phillim. 426.

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expect to be admitted to probate. It is sufficient to observe that it was not suggested, and it may be stated with confidence that it is impossible to shew, that there is any provision of the will of 1858, unless it be the residuary clause in question, which is kept in operation by the will of 1860, otherwise than by its repetition in that instrument, and if this be the case, it strongly tends to shew, though it falls short of absolute proof, that the non-repetition of the residuary clause in the will of 1860 indicates that the testatrix did not intend that it should continue in force. With regard to the disposition of the residuary personal estate contained in the will of 1858, it seems to me to be clear that the testatrix intended by the will of 1860 to make a totally different disposition of that property, which was included in the residuary clause of the first will. In the first place, she omits altogether the Roman Catholic Convent of the Sisters of Mercy at Bermondsey, while she seems to have desired to admit to a participation in her bounty another establishment connected in some way with Lady Georgiana Fullarton, as well as two charities for aged priests and poor Roman Catholic children. Secondly, those establishments which she still continues to wish to benefit (including the intervener's convent) are to receive only one fourth of one-half of her stocks and shares after the death of her sisters, instead of one-third of the whole, as under the will of 1858. The other half of her stocks and shares she gives, after the death of her sisters, to the children of her nephew. These stocks and shares constituted at the time she made the will of 1860, the whole or nearly the whole of the personal property which by the will of 1858 she had given to the three convents. The intention and effect of the will of 1860 was to deprive these three establishments to a large extent of the benefits she had previously conferred on them, and to give them what remained in a different manner, and in different proportions. This appears to me to amount to what is called in *Cutto* v. *Gilbert* (1) an essentially different disposition of the principal subject-matter of the residuary clause of the will of 1858, and therefore to be a revocation of that clause. It is true that by the sale of the Spanish Certificates in 1862 the testatrix had removed them from the operation of her will of 1860, but when we

(1) 9 Moo. P. C. 131.

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are considering the question of the deceased's intention in 1860, the accidental change of her investments in 1862 can give little, if any assistance. It is in the highest degree improbable that the testatrix was aware that the sale of the certificates had any effect on her testamentary dispositions. It is incredible to me that she knew that by so doing she was depriving the children of her nephew of nearly £5000, seeing that in a letter written in February, 1862, she writes, "My funds I have left to Sir William Lawson and his sons, who, after paying my annuities, will divide the remainder between my sisters, and after their death will go (half) to charity, and half to my little great-nieces and nephews, just enough to keep them from starving."

It may be doubtful whether the testatrix intended at the time she made the will of 1860 to dispose only of her stocks and shares; it is possible that the absence of more comprehensive words was purely accidental, but I have no doubt that if the testatrix had such intention, it was because she considered that the shares and stocks constituted the whole of her personal property not previously disposed of, and therefore that any general residuary bequest was useless and unnecessary. The possibility of an undisposed of residue arising did not occur to her mind as a contingency to be provided for, and therefore she made no provision with regard to it. To put the matter in familiar language, I think that if the testatrix had been asked after the execution of the will of 1860, "Do you intend the convents to have any residue which there may be?" I think it may be fairly collected from that will that her answer would have been, "No; because I have otherwise provided for them, and others, by a disposition which I anticipate will leave no residue, and therefore I have not thought it necessary to make any general residuary bequest."

The result is that I am of opinion that the will of 1858 was entirely revoked by that of 1860, and I therefore reject the application to admit it to probate.

Solicitor for plaintiff: *T. Sismey.*

Solicitors for defendants: *Williamson, Hill, & Co.*

1877
Feb. 27.

IN THE GOODS OF BROWN.

Will—Executor according to the tenor.

The testatrix executed a will, which contained a clause to the effect, "I appoint my sister A. B. my executrix, only requesting that my nephews, C. D. and E. F., will kindly act for and with this dear sister":—

Held, that C. D. and E. F. were executors according to the tenor of the will.

AMELIA SEAGOOD BROWN, of Sussex Villa, Ryde, Isle of Wight, spinster, died on the 9th of January, 1877, having executed a will bearing date the 29th of April, 1871. In this will was a clause to the following effect: "I appoint my said sister Susannah Brown my executrix, only requesting that my nephews, Frederick Poynder and John Arthur Beddome, will kindly act for or with this dear sister." Miss Susannah Brown and John Arthur Beddome died in the lifetime of the deceased. All the next of kin of the deceased were willing that probate of the will should be granted to the Reverend Frederick Poynder.

Searle moved that probate be granted to him as executor, according to the tenor of the will. If the sister had been alive, Mr. Poynder would have been entitled to take probate with her. The words "for her" must mean that if for any reason the sister could not take the grant, then that Mr. Poynder shall take it in her place or stead. If it were the intention of the testatrix that Mr. Poynder should act as her executor, it is not material that the word "executor" is not used. He referred to *Grant* v. *Leslie* (1); *In the Goods of Wilmot.* (2)

SIR J. HANNEN (President). I felt at first considerable doubt about this case. On further consideration, I think I am justified in holding that the two nephews of the testatrix are constituted executors according to the tenor of the will. I have already said that I was much struck with the peculiarity of the expression used by the testatrix; for whilst as regards her sister she appoints her executrix, she only requests her nephews to act for or with her. Her request, however, may be a courteous mode of expressing her desire that the nephews should act, and un-

(1) 3 Phillim. 116. (2) 2 Roberts. Eccl. 579.

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doubtedly if she had used the word "appoint" instead of "request" I should have held it to be sufficient. Passing over that point, I have to consider the meaning of the passage in which she expresses her desire that her nephews will kindly act for or with her sister. I do not see how I can give effect to these words without holding that they confer on the nephews the powers of executors. In the case I referred to, *In the Goods of Stevenson* (1), there was simply a request to assist in the execution of the will. I agree with Sir J. Dodson, that such an expression could not mean more than it said, namely, to assist the testatrix in the performance of her duties. But in this case the testatrix wishes her nephews to do more; she asks them to act for or with her sister; but they can only act for or with her in the same character as was conferred on her, namely, as executors. I think, therefore, the case comes within the principle of the decisions referred to by counsel and those cited in Williams on Executors, p. 243, from which it appears that where a testator has expressed a wish that a person named shall administer his estate, he will be held to be an executor. I grant the application.

Solicitors: *Pitman & Lane.*

IN THE GOODS OF INCE.

Feb. 27.

Will—Codicil—Erroneous Reference by Date.

6 PD 20

The testatrix being desirous to revive a will and codicil which had been revoked by a will of later date, sent them to her solicitor, in order that he might prepare a new will for that purpose. To save time he directed his clerk simply to re-copy them, which the clerk did, including the reference by date of the codicil to the first will. In this state the will and codicil were executed on the same day:—

Held, that as there was no distinct intention expressed in the codicil to revoke the last will, the probate should be granted of it, together with the codicil.

LOUISA INCE, of Great Cumberland Place, Hyde Park, spinster, died at Ramsgate on the 22nd of January, 1877. On the 26th of January, 1876, she duly executed a will, and on the 21st of February, 1876, a codicil to such will; but these testamentary papers were revoked by a will executed by her at the end of that year. On the 17th of January, 1877, Mr. Dixon, the solicitor of

(1) 16 Jur. 714.

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the deceased, who had his office in London, received instructions from Miss Ince to send to her a fresh engrossment of the will executed by her on the 26th of January, 1876, and of the codicil dated the 21st of February, 1876; and as there was not time before the post closed to incorporate the will and codicil in one instrument, he gave directions to his clerk to make copies of the will and codicil, omitting the dates, but it did not occur to him at the time that the date of the will was mentioned in the codicil. When the copying was completed, Mr. Dixon himself examined the engrossment of the will, but left the examination of the codicil to another person, who did not observe that the date of the old and revoked will was inserted in such codicil, instead of the date being left, as was intended, in blank, to be filled up at the time of the execution of the papers. The will and codicil were executed on the 18th of January, 1877, in the state they were prepared by the clerk. The will of the 18th of January, 1877, contained a clause revoking all former wills.

Pritchard moved for probate of the will and codicil executed on the 18th of January, notwithstanding the erroneous reference in the codicil to the will of January, 1876. He referred to *Rogers and Andrews* v. *Goodenough and Rogers* (1); *In the Goods of Steele.* (2)

SIR J. HANNEN (President). The will executed in January, 1877, contains a clause revoking all former wills; it therefore revokes the will of January, 1876. On the same day that the testatrix executed her last will, she also executed a codicil which is described as a codicil to her last will. It is true it says *my last will dated 26th January,* 1876, but I am of opinion that the testatrix meant what was really and truly her last will, namely, the document she had executed on the morning of the same day. It was a mere mistake of the date. In the absence of any evidence of intention on the part of the deceased to revive the will of January, 1876, I must grant probate of the will and codicil dated the 18th of January, 1877.

Solicitor: *G. Dixon.*

(1) 2 Sw. & Tr. 342; 31 L. J. (P. M. & A.) 49. (2) Law Rep. 1 P. & M. 575.

8 Jur. NS. 391.

THE ST. OLAF. (B. 295.)

1877
Jan. 16.

Co-ownership—Order on Defendant to deliver up Certificate of Registry—17 & 18 *Vict. c.* 104, *s.* 50—*Discontinuance of Action—Costs—Rules of Supreme Court*, 1875, *Order XXIII., Rule* 1; *Order LV., Rule* 1.

The plaintiffs in an action of co-ownership having obtained an order in the cause requiring the defendant to deliver up the certificate of registry of the ship to them, before delivering a statement of claim wholly discontinued the action without leave of the Court. The defendant thereupon applied to have the action dismissed with costs:—

Held, that the action must be dismissed, and that, under Order XXIII., Rule 1, the defendant was entitled as of right to all the costs of the action.

THIS was an action of co-ownership instituted on behalf of James Bremner and others, part owners of the vessel *St. Olaf*, against the *St. Olaf*, and against James Cormack, the owner of twelve sixty-fourth shares in the above vessel. The writ was indorsed as follows: The plaintiffs claim as a majority of the owners of the *St. Olaf*, of the port of Wick, possession of the said vessel as against James Cormack, the late master thereof, and also possession of the certificate of registry of the said vessel.

On the 13th of May last, counsel on behalf of the plaintiffs moved the judge in court to order the defendant forthwith to deliver up possession of the certificate of registry of the *St. Olaf*, to the agent of the plaintiffs.

The motion was supported by affidavits, which stated in substance that the defendant had been dismissed from the command of the *St. Olaf* by the managing owner of that vessel; but that he had refused to give up the certificate of registry of the vessel.

A counter-affidavit was filed alleging that the defendant had been illegally dismissed. The Court, having heard counsel on both sides, ordered the certificate of registry to be delivered up as prayed by the motion, on the plaintiffs undertaking to be answerable for any damages occasioned by such delivery. (1)

On the 9th of June, 1876, before any statement of claim had been delivered in the action, the solicitors for the plaintiffs gave the solicitors for the defendant notice that they wholly discontinued the action.

(1) See *The Frances*, 2 Dodson, 420.

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Jan. 16. *E. C. Clarkson*, on behalf of the defendant, moved the judge in court to condemn the plaintiffs in all the costs of the action. The defendant has a right to costs under Order XXIII., Rule 1, of the rules and orders annexed to the first schedule of the Judicature Act, 1875, and this rule is in nowise controlled by Order LV., Rule 1, in the same schedule, which is merely a general rule providing that, subject to the Act, all costs shall be in the discretion of the Court.

W. G. F. Phillimore, on behalf of the plaintiffs, contrà. Order XXIII., Rule 1, and Order LV., Rule 1, must be construed together, and so construed they enable the Court, when an action is discontinued, to make in its discretion whatever order as to costs it may think fit. If the Court has this discretion, it will in the circumstances of the case exercise it in favour of the plaintiffs, because the plaintiffs in the cause have succeeded in obtaining the certificate of registry.

E. C. Clarkson, in reply.

SIR ROBERT PHILLIMORE. There is no doubt that, according to the practice prevailing in the High Court of Admiralty before the Judicature Act came into operation, the defendant would have been entitled to all the costs of the action, other than those relating to the motion to obtain possession of the certificate of registry of the vessel. The Court, however, must now be guided in the first place by the provisions as to costs contained in the Rules of Court in the first schedule annexed to the Judicature Act, 1875, so far as they are applicable to the case. Now, the only two Rules of Court to which I have been referred are Order XXIII., Rule 1, and Order, LV., Rule 1: Of these two rules, the former is a distinct order, and in my opinion is not overriden by the subsequent Order, LV., Rule 1, which is a provision as to costs generally. I think Mr. Clarkson is entitled as of right to the prayer of his motion.

Solicitors for plaintiffs: *Harper, Broad, & Battcock.*
Solicitors for defendant: *Lowless & Co.*

THE JULIA FISHER. (O. 349.)

1877
Feb. 15.

Collision—Practice—Foreign Defendants resident Abroad—Counter-claim—Security for Costs.

A collision occurred between two vessels, the *V.* and the *J. F.*, each owned by foreigners resident abroad. Both vessels were damaged in the collision, and to recover for the damage sustained by the *V.* her owners instituted a cause of collision against the *J. F.* The owners of the *J. F.* appeared as defendants, and delivered a statement of defence and counter-claim claiming that the *V.* should be condemned in the damage sustained by the *J. F.* in the collision, and in costs. On application on behalf of the plaintiffs, the Court ordered the defendants to give security for the plaintiffs' costs. Thereupon the defendants gave security in respect of the costs of the counter-claim only.

At the hearing the Court dismissed the counter-claim, on the ground that the defendants had not given security for the plaintiffs' costs of the whole action.

3 Q B D 325
4 C P D 384
12 Q B D 81
54 L J P D 14

THIS was an action of collision instituted on behalf of the owners of the Norwegian vessel *Velox* and the owners of her cargo against the foreign vessel *Julia Fisher* and her freight, for the recovery of damages sustained by the *Velox* in a collision between the two vessels on the 2nd of August, 1875.

The *Julia Fisher* was arrested in the action, and her owners, who were foreigners resident abroad, appeared as defendants, and obtained her release, giving bail in the sum of 2950*l.* Afterwards the plaintiffs were called upon to give, and gave security for costs in 300*l.*, and a statement of claim having been delivered in the action, the solicitors for the defendants delivered a statement of defence and counter-claim. The statement of defence stated the circumstances of the collision, and alleged that at the time of the collision the *Velox* had not her proper regulation lights properly exhibited, and had neglected to sound her fog-horn, as required by the 10th article of the regulations for preventing collisions at sea, and that the collision was occasioned by the negligence of those on board the *Julia Fisher*. The counter-claim was as follows:—

And by way of counter-claim, the defendants say that they repeat the statements hereinbefore contained, and say that the *Julia Fisher* was damaged in the collision.

On the 11th of January, 1877, after the statement of defence and counter-claim had been delivered, and after the plaintiffs had

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given bail in 500*l.* to answer the damage sustained by the *Julia Fisher* in the collision, the solicitors for the plaintiffs took out a summons before the registrar, calling upon the defendants to shew cause why they should not give security in 300*l.* to answer costs. The registrar referred the summons to the judge, and on the 6th of February, the judge in court, after hearing counsel for the plaintiffs and defendants, directed the defendants to give security in the sum of 150*l.* to answer the plaintiffs' costs. Thereupon the defendants gave security in the sum of 150*l.* to answer the plaintiffs' costs in respect of the defendants' counter-claim; and on the 12th of February notice was given to the plaintiffs' solicitors that such security had been given.

Feb. 14. The action came on to be heard.

Milward, Q.C., and *W. G. F. Phillimore*, for the plaintiffs, submitted that the counter-claim set up by the defendants ought to be dismissed, on the ground that the order made by the Court on the 6th of February, requiring the defendant to give security to answer the plaintiffs' costs, had not been complied with.

E. C. Clarkson and *Myburgh*, for the defendants, contrà.

[THE COURT directed that the case should be proceeded with, and intimated that if the defendants were not prepared to give security for the plaintiffs' costs generally, the counter-claim would be dismissed.]

Feb. 15. The hearing of the action was continued.

On the case of the plaintiffs being concluded, the counsel for the defendants stated that the defendants were not prepared to give security otherwise than as they had already done.

SIR ROBERT PHILLIMORE. In this case, one of damage by collision, a question has been raised as to the extent to which one of the parties to the action should give security for costs. The *Julia Fisher*, having been arrested at the suit of the owners of the *Velox*, bail was given in the action; not, however, in the full amount claimed, but only to the extent of the value of the ship. The owners of the *Velox*, the plaintiffs, being foreigners, were then called upon to give and did give security for costs, and subsequently when a counter-claim was set up by the defendants, they

gave security for the full amount of that counter-claim. By thus setting up a counter-claim the owners of the *Julia Fisher* became as much plaintiffs as the party who originated the action. The pleadings delivered, the evidence to be given, and the arguments of counsel will all be common to both claim and counter-claim, and in principle it is not easy to distinguish between the costs incident to the one or the other. In these circumstances the plaintiffs contend that, as the owners of the *Julia Fisher* are foreigners likewise, they are liable to be called upon to give security for the costs of the action generally. The adverse contention, however, is that the owners of the *Julia Fisher* should only give security for costs occasioned by the counter-claim, not for the whole costs of the action. If this contention prevailed, it is manifest that the position of the owners of the *Julia Fisher* would be the best of the two, because if the owners of the *Julia Fisher* win, they will have security for damages and all costs; if the owners of the *Velox* win, they will have security for damages and only a portion of their costs; this would be clearly inconsistent with equity.

It may perhaps be said that to require security for the whole costs of the action is requiring the owners of the *Julia Fisher*, quâ defendants, to give security for costs, but it must be remembered that, although in actions in personam security is not required of a defendant, in actions in rem a different practice has always prevailed. The action is brought and security is given, as a rule, in cases where the value of the res is sufficient, in a sum to cover damages and costs, and both damages and costs are constantly recovered upon the bail bond so given on behalf of a defendant. After some consideration, therefore, I have arrived at the conclusion that as all the issues now constitute, so to speak, one cause, the party liable to costs is liable to the costs of the whole action, and the party liable to give security for costs is liable to give security for the whole costs of the action, subject always to any special order which the Court may in any particular case think it proper to make. In the present case the order already made must be adhered to. The party being a foreigner who has set up a counter-claim, and asked for a decree for damages in his own favour, must give security for costs generally, or his own counter-claim must be struck out. As the owners of the *Julia Fisher*

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are not prepared to give security for the whole of the plaintiffs' costs their counter-claim must be dismissed.

Solicitors for plaintiffs: *Waddilove & Nutt.*

Solicitor for defendants: *Cooper.*

Distinguished. THE ARDENNES. [1950] 2 All E.R. 517.

March 27.

[IN THE COURT OF APPEAL.]

THE PARANA. (6664.)

Damage—Delay—Loss of Market.

Where, on account of defects in the ship, the voyage had been protracted, and in the meantime the market price of the goods shipped had fallen:—

Held, reversing the judgment of the Admiralty Division, that the consignee could not recover damages for the loss of market.

APPEAL from a judgment of the Admiralty Division, allowing damages for the loss of profits on cargo through the default of the shipowner.

By a charterparty it was agreed that the steam-ship *Parana* should load at Manilla and Ilo-Ilo, and proceed to London. She accordingly took on board some hemp and sugar at Manilla and more sugar at Ilo-Ilo; and then called at Singapore to fill up. In consequence of the weakness and defective state of her engines she was 127 days on the voyage from Ilo-Ilo to London, sixty-five or seventy days being said to be a fair average time. The assignee of the bills of lading, who was stated to be a mortgagee, instituted a cause of damage for this delay, claiming for loss by leakage of the sugar, and for loss on account of a fall in the price of hemp between the time when the ship ought to have arrived and the time when she did arrive. The plaintiff had kept the hemp for some time afterwards, and had then sold it at a considerable loss.

The registrar and merchants allowed the damages for leakage of the sugar, but disallowed the damages for loss by the fall of price in the hemp. The Judge of the Admiralty Division, on appeal, allowed 289*l.* 5*s.* 9*d.* for loss of market by the fall of price in the hemp. The facts of the case are fully stated in the report of the case in the Court below. (1)

(1) 1 P. D. 452.

The defendant appealed.

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March 9. *Watkin Williams, Q.C.*, and *Cohen, Q.C.*, for the defendant. This is the first time that damages have been allowed to a shipper for loss of market, and such damages ought not to be allowed. The difficulties in allowing them are insuperable. If sugar had gone up whilst hemp had gone down, it would be impossible to allow the shipper to recover for the hemp and not allow for the sugar, and yet what is to be done if they belong to different shippers? Is the shipowner to lose when prices fall and not to gain when they rise? The matter is very clearly put in *Smeed* v. *Ford*. (1) The cases as to delay on land have no bearing on this case, for by land the arrival at a fixed time may reasonably be calculated on, but a sea voyage is always uncertain. Here the ship was to stop and fill up, and no one could say how long she would be. *Hadley* v. *Baxendale* (2) is decisive. In *Fletcher* v. *Tayleur* (3) the principle was not questioned. A man might as well be held liable for damages for not paying money on a given day: *Cory* v. *Thames Ironworks Co.* (4) *British Columbia Saw Mill Co.* v. *Nettleship* (5) shews the principle. In *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (6) the purpose for which the goods were wanted was known to the carrier; and so in *Collard* v. *South Eastern Ry. Co.* (7) If the shipowner had been asked whether he agreed to be liable for delay, of course he would have refused. The consignee is not obliged to sell directly the goods arrive, and in fact he did not; but suppose that before he did sell the price had risen, could he still recover? Under the Code Napoleon such damages can be recovered only when there has been fraud: Code Civil, Art. 1150, 1153.

E. C. Clarkson, and *Davison*, for the plaintiff. The shipper has a right to expect that the ship will carry the cargo in the usual time, and damages for loss of market under such circumstances have often been allowed: *Horne* v. *Midland Ry. Co.* (8); *O'Hanlan*

(1) 1 E. & E. 602; 28 L. J. (Q.B.) 178. 5 Jur N.S. 291
(2) 9 Ex. 341; 23 L. J. (Ex.) 179.
(3) 17 C. B. 21; 25 L. J. (C.P.) 65.
(4) Law Rep. 3 Q. B. 181.
(5) Law Rep. 3 C. P. 499.
(6) 9 C. B. (N.S.) 632; 20 L. J. (C.P.) 232.
(7) 7 H. & N. 79; 30 L. J. (Ex.) 393. 7 Jur N.S. 950
(8) Law Rep. 8 C. P. 131.

(2) 8 C 18 Jur 358.

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v. *Great Western Ry. Co.* (1); *Borries* v. *Hutchinson.* (2). Is the shipper never to be entitled to damages whatever be the delay, and is he only to be allowed interest on his capital, however great his loss may have been? He has paid the high freight on a steamer in order to have a quick delivery, and he is entitled to damages for not getting it. There can be no difference in principle between a carrier by land and a carrier by sea.

Watkin Williams, Q.C., in reply.

Cur. adv. vult.

March 27. The judgment of the Court (James, L.J., Mellish, L.J., and Baggallay, J.A.), was delivered by

MELLISH, L.J. (After stating the facts and proceedings in the case.) The question we have to decide is whether, if there is undue delay in the carriage of goods on a long voyage by sea, it follows as a matter of course that, if between the time when the goods ought to have arrived and the time when they did arrive, there has been a fall in the price of such goods, damages can be recovered by the consignee of the goods. Now there is really no difficulty as to the general principles upon which the Courts assess the damages. They are accurately stated in the judgment of Sir Robert Phillimore (3):—"The principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." He also cites the judgment of the Lord Chief Baron in *Horne* v. *Midland Ry. Co.* (4), to the effect that "Damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the

(1) 6 B. & S. 484; 34 L. J. (Q.B.) 154. 11 Jur. N.S. 797.

(2) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169. 11 Jur. N.S. 267.

(3) 1 P. D. at p. 463, citing from the case of *Simpson* v. *London and North Western Ry. Co.*, 1 Q. B. D. at p. 277.

(4) Law Rep. 8 C. P. at p. 137.

contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The difficulty, of course, arises in the application of those principles. We took time to consider our judgment because many authorities were cited, both in the Court below and before us, though it seems to us that there is no decision which can be said to be directly in point. There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived and the time when they did arrive—no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if, by reason of breach of contract, they do not arrive in time, damages for loss of market may be recovered. Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower.

But besides the cases of consignments of goods to be sold at a particular market, cases were cited—and it was on them that the Court below proceeded—of the carriage of goods by railway, where damages for loss on account of a fall in the market have been recovered. It was said that there can be no difference between the carriage of goods by railway and the carriage of goods by sea, but it appears to me there may be a very material difference

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between the two cases. When goods are conveyed by railway, if they are conveyed for the purpose of sale, it is usually for the purpose of immediate sale; and if the cases are examined, I think it will be found that the Courts treated them as if the goods were consigned for the purpose of immediate sale. No doubt if goods are consigned to a railway company under such circumstances, the railway company may be reasonably supposed to know that they are consigned for the purpose of immediate sale, and if by breach of contract on the part of the company they do not arrive in time to be sold when the owner intends them to be sold, that may possibly be a ground for giving damages for what is called "loss of market." The strongest case in favour of the decision of the Court below is that of *Collard* v. *South Eastern Ry. Co.* (1), but there was a good deal of doubt about that case. The goods in that case were hops, and were consigned to a hop merchant, in fulfilment of an actual contract. The damages arising from the non-fulfilment of that particular contract could not be recovered, because, of course, the railway company would know nothing about it; but the Court came to the conclusion that the case must be treated as if the goods were consigned for the purpose of immediate sale. There were apparently very violent fluctuations going on in the hop-market at that time, and it might be taken that the owner had selected his own time for selling his hops, when he thought the price was at its best, and by reason of a breach of contract on the part of the railway company—which consisted, it is to be observed, not in delay in delivering the hops, but in actual damage to the hops (the hops were damaged and had to be dried)—it might be considered that there was a loss of market. Mr. Baron Martin there says (2): "It is said that the defendants had no notice of the purpose for which the hops were sent to London; but I think that they must have known that they were sent for one of two purposes—either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit. It seems to me that *Hadley* v. *Baxendale* (3) has no bearing on this case, and I think that *Smeed* v. *Ford* (4) was correctly decided. In my judgment the plaintiff is entitled

(1) 7 H. & N. 79; 30 L. J. (Ex.) 393.
(2) 7 H. & N. at p. 86.
(3) 9 Ex. 341; 23 L. J. (Ex.) 179.
(4) 1 E. & E. 602; 28 L. J. (Q.B.) 178.

(11 C.B. 7 Jur. N.S. 950) (3) 5 C.B. 18 Jur. 358

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to recover for this damage, because it is a direct and immediate loss consequent on the defendants' breach of duty." Then he he says: "If this case should be taken to the Court of Error"—shewing he had some doubt about the principle they were laying down—"I hope that Court will be able to put the rule on an intelligible footing; but at present we must do the best we can with each particular case, and decide it upon principles of reason and good sense."

The other case on which Sir Robert Phillimore principally relied was an American case of *Ward* v. *New York Central Ry. Co.* (1), in which some pigs had been sent, and there damages were allowed to be recovered. The precise circumstances it is not very easy to gather, but I should certainly conjecture that the pigs sent in that case were sent for the purpose of being sold at once.

The difference between cases of that kind and cases of the carriage of goods for a long distance by sea seems to me to be very obvious. In order that damages may be recovered, we must come to two conclusions—first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of those two assumptions in this case. Goods imported by sea may be, and are every day, sold whilst they are at sea. If the man who is importing the goods finds the market high, and is afraid that the price may fall, he is not usually prevented from selling his goods because they are at sea. The sale of goods to arrive, the sale of goods on transfer of bill of lading, with cost bills and insurances, is a common mercantile contract made every day. It may be that from not having samples of the goods, or from not knowing what is the particular quality of his goods, the consignee may have a difficulty in selling them until they arrive, but that would not affect the question. Nor would it signify that the goods no longer belonged to the original consignee, but to a man who had acquired them by the assignment of the bill of lading whilst the

(1) 47 N. Y. 29.

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goods were at sea. We were told that in this case the plaintiff was a person who had advanced money on the security of the bills of lading. That possibly may be the case; but whether he has done that, or is the purchaser, would make no difference. It was said that the goods were sold, and that if the person who sells them does not suffer the damage, then the purchaser would suffer the damage. But that is pure speculation. If a man purchases goods while they are at sea, no person can say for what purpose he purchases them. He may purchase them because he thinks that if he keeps them for six months they will sell for a better sum, or he may want to use them in his trade. It is pure speculation to enter into the question for what purpose he purchases them. In this particular case the plaintiff did not sell the goods when they arrived, for he sold them some months afterwards, when a further fall had taken place in the market. Of course, he does not seek to recover from the defendant that additional loss, but this serves to illustrate how uncertain it is whether he would have sold them. If he did not sell them when they did arrive, but kept them because he thought the market would rise, how can we tell that he would not have done exactly the same thing if the goods had arrived in time? Therefore, it seems to me, that to give these damages would be to give speculative damages—to give damages when we cannot be certain that the plaintiff would not have suffered just as much if the goods had arrived in time. According to the principles on which the Courts have acted in all such speculative and uncertain cases damages ought not to be recovered.

Therefore, upon the whole, we have come to the conclusion that the report of the registrar and merchants is right. They said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accidents such as collisions goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market; and we are of opinion that the conclusion which the registrar and merchants came to was right. The consequence, therefore, is, that the judgment of the Court below must be reversed.

As to the costs, the registrar and merchants reported that each

party ought to pay his own costs of the inquiry before them, and we think that ought to be retained, and that the appellant should have his costs of the argument in the Court below. 1877 THE PARANA.

Judgment reversed.

Solicitors for plaintiff: *Stibbard & Cronshay.*
Solicitors for defendant: *Parker & Clarke.*

[IN THE COURT OF ARCHES.] *Feb.* 17.

HUDSON AND OTHERS *v.* TOOTH.

Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *s.* 9—*Respondent in Contempt for Disobedience to Inhibition—Significavit—Writ de Contumace Capiendo*—53 *Geo.* 3, *c.* 127, *s.* 1—*Release*—3 & 4 *Vict. c.* 93, *s.* 1—*Costs of Proceedings in Contempt.*

4 P.D. 96; 103; 8 P.D. 84

After the hearing of the matter of a representation in which the vicar of a parish was the party complained of, a monition issued admonishing the vicar to abstain from certain unlawful ceremonies and observances during the performance of divine service in the parish church. The vicar disobeyed this monition, and was served with an inhibition under the Public Worship Regulation Act, 1874, inhibiting him for the term of three months from performing divine service within the diocese. Afterwards, and whilst the inhibition was still in force, the complainants applied to the Court on affidavits, which alleged that since the inhibition the vicar had performed divine service in the church, and had there continued the ceremonies and observances from which he had been admonished to abstain, and had also obstructed the curate appointed by the bishop of the diocese from entering the church, and prayed that the vicar should be pronounced contumacious. Thereupon the vicar was pronounced by the Court to be contumacious; and his contempt having been signified to the Queen in Chancery, he was arrested and imprisoned under a writ de contumace capiendo.

Shortly after the vicar had been thus arrested, divine service was, without any opposition being offered, performed in the church by the curate appointed by the bishop, and the complainants applied to the Court on motion that the vicar should be released:—

The Court ordered that the vicar should be forthwith released without previous payment of the costs of his contempt, but without prejudice to any other remedy for such costs; and that such costs should be recoverable as costs in the cause.

THIS case came before the Court by virtue of a requisition from the Archbishop of Canterbury under the provisions of the Public Worship Regulation Act, 1874, requiring the Dean of Arches to

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hear and determine the matter of a representation made by Robert Hudson, Samuel Gardiner, and Robert Gunston, three parishioners of the new parish of St. James, Hatcham, in the diocese of Rochester, duly qualified according to the Act, and in which representation the Rev. Arthur Tooth, vicar of the said new parish, was the party complained of.

The nature of the matters and practices complained of in Articles 1, 3, 4, 5, and 7 to 15 of the representation sufficiently appear from the judgments of the Court. The 2nd and 6th articles complained of matters and practices the same in substance as were complained of in the 2nd and 5th articles of the representation filed in the recent case of *Clifton* v. *Ridsdale*. (1)

The 16th, 17th, and 18th articles of the representation alleged substantially as follows:—

16. The said Rev. Arthur Tooth, on Sunday, the 30th of January, 1876, without lawful authority and unlawfully, caused or permitted and suffered to be placed upon the communion table, or on a ledge behind and a little above the same, and to remain thereon during the performance of divine service, several small images or figures about a foot or eighteen inches in height, having gilt wings.

17. The said Rev. Arthur Tooth, without lawful authority and unlawfully, and since the consecration of the said church, that is to say, about the month of August in the year 1872, introduced into the middle of the said church, and still unlawfully retains there, a large crucifix several feet high over the nave near the pulpit.

18. The said Rev. Arthur Tooth, without lawful authority and unlawfully, since the consecration of the said church, that is to say, in the year 1872, introduced into the south aisle of the said church, and still unlawfully retains there, a second or additional communion table besides the communion table in the chancel.

No appearance was entered on the part of Mr. Tooth, and the case came on for hearing at Lambeth Palace before the Dean of Arches (the Right Hon. Lord Penzance), on the 13th of July, 1876.

A. J. Stephens, Q.C., *Benjamin Shaw*, and *Blakesley*, appeared for the complainants.

Oral evidence was produced on behalf of the complainants in support of all the articles of the representation. (2)

The counsel for the complainants submitted that the complain-

(1) 1 P. D. 316.

(2) In support of the contention that the additional communion table described in the 18th article of representation was unlawful, the counsel for the complainants referred to the

ants were entitled to judgment on all the matters complained of in the representation, but, that having regard to the questions of law under appeal before the Judicial Committee of the Privy Council in the case of *Clifton* v. *Ridsdale* (1), it was not desired by them that the monition to be issued in accordance with the judgment of the Court should, pending the decision of the appeal in that case, be enforced with respect to such matters, acts, practices, and things as were complained of in the 2nd, 6th, and 17th articles of the representation. (2)

Cur. adv. vult.

July 18, 1876. LORD PENZANCE. This is a proceeding under the Public Worship Regulation Act, 1874, in which no appearance has been entered for the respondent. It is not to be wondered at that the suit is undefended, as the acts charged in the representation have been proved without dispute, and the law which the Court has to administer is beyond question.

The respondent, the Rev. Arthur Tooth, vicar of the parish of St. James, Hatcham, has for some time been in the habit of celebrating the Holy Communion in the following manner:—The communion service was preceded by a procession, moving from the vestry to the communion table, upon which, or upon a ledge above which, candles had just been lighted. The procession consisted of

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case of *Sharpe and Others* v. *Lee and Others* (Cons. July 4, 1870), where Sir Travers Twiss refused a confirmatory faculty for the erection of an additional communion table in the church of St. Chad, Haggerstone. On the same point they also referred to 1 Cardwell's Documentary Annals, 101, and *Westerton* v. *Liddell* (Moore's Special Rep.)

(1) 1 P. D. 316.

(2) In the course of the hearing the following points of practice arose and were decided by the Court:—

Shaw submitted that the Court had no power under the Public Worship Regulation Act, 1874, or otherwise, to order that notes of the evidence should be taken by a sworn shorthand writer.

The Court directed that a shorthand writer should be sworn to take notes of the evidence, and intimated that the costs of his attendance would be costs in the cause.

On it appearing from the statement of the counsel that one of the complainants, though resident in the parish of St. James, Hatcham, at the time of the making of the representation, had before the hearing of the cause ceased to be so resident, the Court intimated that the provisions of the Public Worship Regulation Act, 1874 were sufficiently complied with if the complainants being duly qualified in other respects were resident in the parish at the date of the representation.

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boys carrying incense, lighted candles, and a crucifix on a pole, and was attended by Mr. Tooth himself wearing an alb, girdle, maniple, amice, stole, and chasuble, with a cap called a biretta on his head. Having arrived at the communion table the service proceeded, the different vessels were censed, the biretta was taken off the head and laid with ceremony on the table. The epistle and gospel were read with the back of the officiating minister turned towards the congregation. Water was mixed with the wine, the prayer of consecration was said with the back of the celebrant turned towards the congregation, the celebrant knelt at certain parts of the prayer of consecration, and afterwards elevated the sacred elements above his head. The sign of the cross was made towards the congregation, the Agnus Dei was sung, the great bell of the church was tolled, certain attendants on the clergy were present wearing skull-caps, two boys held lighted candles in the air, and the Holy Communion was either received by the celebrant alone, or by himself and one other person. All this was not casual but apparently habitual. The evidence proving it was addressed to six Sunday mornings, taken at intervals between the 8th of August, 1875, and the 30th of January, 1876. It involved, moreover, a repetition of the same or nearly the same observances on each day. On Sunday, the 30th of January, 1876, an addition was made to the ceremony by placing six figures of angels with gilt wings on the communion table. Whether this mode of conducting the communion service was right or wrong in itself, or how far it was conformable with Holy Scripture, it is utterly beyond my province to inquire, but no one can, I think, read the rubrics of the Prayer Book, by which the celebration of the Holy Communion is governed in the Church of England, without perceiving that the greater part of that which is complained of is wholly unwarranted by anything which is there to be found. With respect to the matters complained of in the 2nd and 6th articles of the representation—I allude to what has been called the Edwardian vestments and the eastward position—there has been a considerable controversy (which cannot be said to be even now set at rest) as to the true meaning of the rubrics. Indeed the last decision upon the rubrics is at this moment under appeal to Her Majesty the Queen before the ultimate tribunal of this country for ecclesiastical

causes. The other ceremonies and observances of which evidence has been given have been each and all at one time or another declared unlawful by the decisions of this Court or the Court of Appeal, except, perhaps, the ceremonial use of the figures of angels with gilt wings. But the principles of the decisions I have referred to exclude the addition of any other ceremonial observances to those prescribed by the rubrics, and appear to me to be therefore applicable to the use of these figures.

Under these circumstances it only remains for me to order a monition to issue to the respondent admonishing him to abstain from these various practices, and the permitting or sanctioning of them in future, and to order that he should pay the costs of these proceedings.

Complaint has further been made in this suit of certain structures which, by the respondent's authority, have been put up in his church—a crucifix set up on a beam crossing the nave of the church, and a second communion table placed in the south aisle. As no faculty has been obtained for these additions and alterations, I must order them to be removed. If the respondent is advised that they are lawful alterations and additions his right course will be to apply for a faculty to authorize them, when the propriety of them can be fairly discussed. I think it right to intimate—as I understand it to be the wish of the complainants that I should—that as to any of the matters now under appeal to the Queen in Council, the monition will not be enforced until the Appellate Court has given its decision.

In accordance with this judgment, a monition was taken out by the proctors for the complainants, and was personally served on Mr. Tooth on the 29th of July last.

On the 2nd of December last, *Shaw*, on behalf of the complainants, moved the Court to decree an inhibition to enforce obedience to the monition to issue with costs. He stated that it was not the wish of the complainants that the inhibition should be granted in respect of any practices the legality of which was then under appeal.

The motion was supported by affidavits, which stated in detail that the matters, acts, practices, and things complained of in the

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first 15 articles of the representation, and from which, and from the sanctioning of which, Mr. Tooth had been admonished by the monition to abstain, had been done, performed or sanctioned by him during the morning prayer and the communion service in the church of St. James, Hatcham, on several occasions subsequent to the service of the monition, namely, on Sundays September 24th, October 15th and 22nd, and November the 12th and 19th, 1876; and that on all the said occasions there was in the south aisle of the said church a second or additional communion table, being, as was believed, the same table as was mentioned in the 17th article of the representation.

The motion was not opposed, and the Court directed the inhibition to issue as prayed, and condemned Mr. Tooth in the costs of and incident to the said inhibition. The inhibition, which was in the form required by the Rules and Orders made under the provisions of the Public Worship Regulation Act, 1874 (1), and inhibited Mr. Tooth for the term of three months from its publication, and therefrom, until the same should have been duly relaxed, from performing any service of the church or otherwise exercising the cure of souls within the diocese of Rochester, was issued out of the Registry on the 13th of December; it was served on Mr. Tooth and was duly published as required by law on Sunday, the 17th of December.

On the 23rd of December, the Bishop of Rochester granted his license and authority to the Rev. Richard Gee, D.D., "to perform the office of curate in the parish church of St. James, Hatcham."

On the 11th of January a notice, signed by the proctors for the complainants, was personally served on Mr. Tooth; such notice, so far as material, was as follows:—

Take notice that the Court on the 13th of January will be moved that you the Rev. Arthur Tooth, the respondent, be pronounced guilty of contempt of court, by reason of disobedience to the inhibition served on you in the above case of *Hudson* v. *Tooth*, in respect of your having performed divine service and preached and otherwise exercised the cure of souls in the church of St. James, Hatcham on divers days, namely, on Sunday, the 24th of December, and on Sunday, the 31st of December, all in the year 1876, and also in respect of having uttered and published on the 24th of December, 1876, a libel upon the Court and its authority, and that you be punished accordingly.

(1) 1 P. D. 27.

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Affidavits in support of the motion were filed on behalf of the complainants. Two of such affidavits, made respectively by one of the complainants, and a witness who had given evidence on affidavit in support of the application for the issue of the inhibition against the respondent, alleged that the deponents were present at the morning prayer, and at the communion service in the church of St. James, Hatcham, on Sunday, the 24th of December, 1876, and Sunday, the 31st of December, 1876; that the Rev. Arthur Tooth was present and preached the sermon, and was the officiating minister in the communion service; and that on both the said occasions the mode of conducting the service was generally the same as described in the representation in the suit. In another affidavit the secretary of the Bishop of Rochester deposed, inter alia, in substance as follows:—

On the morning of Sunday, the 24th of December last, at the request of the Bishop of Rochester, I accompanied the Rev. Richard Gee, D.D., to the parish church of St. James, Hatcham. On the occasion when I so accompanied him, Dr. Gee went to the said church by the direction of the Bishop of Rochester, for the purpose of performing divine service there. On arriving at the church, Dr. Gee and I were met just after entering the church by Mr. Tooth, and about thirty or forty other persons (including the churchwardens of the parish), who all placed themselves so as to bar the further progress of Dr. Gee up the church. Mr. Tooth thereupon proceeded to read from a written paper (1) a protest against the jurisdiction of the Court by which he had been inhibited from officiating in the church of St. James, Hatcham, refusing the said Dr. Gee any part in the public performance of divine worship, and forbidding any exercise of his office within the limits of the parish of St. James, Hatcham. The churchwardens stated in effect that they supported Mr. Tooth in the course he had taken. Dr. Gee, therefore, retired from the church, stating that he did so under protest.

Jan. 13. *A. J. Stephens, Q.C.* (*Shaw* with him) moved the judge in Court in accordance with the above notice of motion.

Mr. Tooth did not appear.

LORD PENZANCE. The parishioners of St. James, Hatcham, who have promoted this suit have at length applied to this Court to enforce upon Mr. Tooth obedience to the orders which it has made. It cannot be a matter of surprise that their patience should have been at last exhausted, the only wonder is that it should have endured so long, but from first to last the greatest

(1) A copy of this written paper was annexed as an exhibit to the affidavit.

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consideration has been shewn to Mr. Tooth in his irregularities and breaches of the law, and even up to the present moment no inhibition has been asked for or issued against him in respect of those matters which, though they have been declared illegal by the Court of Appeal in the *Purchas Case* (1), are the subject of the appeal now pending in the case which arose at Folkstone. (2) On all the points, therefore, in which Mr. Tooth's obedience is sought by the promoters of this suit to be enforced, the law has been already settled. No appeal is pending, and Mr. Tooth has not attempted, either in this Court or by way of appeal, to uphold the legality of his proceedings. In this state of things the promoters of the suit require at the hands of the Court the exercise of such powers as it possesses to enforce the decrees they have obtained; an application which the Court has no discretion to refuse.

But some misapprehension appears to exist as to what those powers are. It has been suggested that the 9th section of the Public Worship Regulation Act confers upon this Court new powers for the enforcement of its decrees; this is an erroneous interpretation of the statute, the new powers given to the Court being confined to proper facilities for a due hearing of the case under the new forms of procedure which that Act has introduced. The powers which this Court possesses for the enforcement of its decrees are such and such only as it possesses as the provincial Court of the province of Canterbury. It need hardly be necessary to call to mind that the provincial court of the Archbishop is a purely ecclesiastical court; that as such it has no temporal or secular jurisdiction, and no inherent authority over the property or liberties of the Queen's subjects; and accordingly, from the most ancient times, the chief means at its disposal for enforcing obedience to its mandates consisted in a sentence of excommunication. The time, however, came when these sentences of excommunication were further enforced by the civil power by means of the King's writ de excommunicato capiendo. It is not necessary to refer particularly to the statutes on this subject. As time went on it was thought desirable by the Legislature that the sentence of excommunication should, except in certain cases, be abolished and

(1) Law Rep. 3 A. & E. 66; Law Rep. 3 P. C. 605. (2) 1 P. D. 316.

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discontinued, and the statute of 53 Geo. 3, c. 127, accordingly provided that the judges of the ecclesiastical courts "whose lawful orders or decrees have not been obeyed" should in future pronounce the persons disobeying them "contumacious and in contempt," and signify the same to the King in Chancery; and that thereupon a writ de contumace capiendo should issue against such persons, and they should be detained in custody until they made submission to the orders of the ecclesiastical court. The civil power has thus been brought in to the aid of ecclesiastical authority, and the declining efficacy of the sentence of excommunication has been supplemented by a power of imprisonment entirely foreign to the original jurisdiction of a purely ecclesiastical court. Applying these powers, as I am bound to do, I have no hesitation in pronouncing Mr. Tooth to be contumacious and in contempt for disobeying the inhibition issued by this Court; and I direct the same to be signified forthwith to the Queen in Chancery, with a view to his imprisonment.

Under ordinary circumstances there would, in granting this application, be little more to say; but the circumstances are not ordinary, for the jurisdiction of this Court has been openly denied, and mischievous delusions have been propagated as to its functions and authority.

In the case of Mr. Ridsdale (1), the first which occurred since the Public Worship Regulation Act, I made some observations on this subject, and I still think it worth while, for the sake of others (however little Mr. Tooth may regard anything that falls from this Court), to point out in what those delusions consist. They consist primarily in the idea that this Court of Arches is a secular and temporal court, and not a spiritual or ecclesiastical one. Those who take part with Mr. Tooth conceive, as I understand it, that the only courts which can properly take cognizance of any irregularities in his ministrations are the ecclesiastical, and not the temporal courts; and this they say is founded on an existing right in the Church of England to govern herself in spiritual matters, including matters of ritual. The Public Worship Regulation Act they say was an innovation, and an invasion of this right by referring questions of ritual to a secular tribunal.

(1) 1 P. D. 316.

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It would be well if those who maintain these propositions were to read the statutes by which the ritual of the Church of England at the time of the Reformation was prescribed and enforced; I mean the statutes authorizing and establishing the two successive Prayer Books of King Edward VI. and the Prayer Book of Queen Elizabeth, which regulated the ritual of the reformed Church for the first one hundred years after its establishment. They would there find that a clergyman, departing in the performance of divine service from the ritual prescribed in the Prayer Book, was liable to be tried at the assizes by a judge and jury (the bishop if he pleased assisting the judge), and if convicted, that he was liable for the first offence to lose a year's profits and six months' imprisonment; for the second, to deprivation and a year's imprisonment; and for the third, to be imprisoned for life. (1)

The intervention therefore of a temporal court, if any such were in question, to enforce obedience in matters of ritual would at least be no novelty; the novelty, if any, is in the claim to be exempt from it. But suppose, for the sake of argument, that the claim to be judged only by an Ecclesiastical Court be admitted, what, I may ask, are the ecclesiastical courts to whose judgment Mr. Tooth and they who act and think with him would be willing to defer? It is not to be presumed that Mr. Tooth proposes to settle for himself, as the minister of an established church, how the divine services of that church, which are intended to be in the main uniform throughout the country, should be performed. If he arrogates to himself this right, every beneficed clergyman in the kingdom has it also; and there might be as many forms of worship in the Church as there are parishes in the land.

But if he is not to settle the form of worship for himself, and he considers himself bound by the directions of the Prayer Book, who is it that in his opinion ought to determine what it is that the rubrics of the Prayer Book enjoin? What is the court that has the jurisdiction to which he is ready to render obedience? Is it the court of his bishop? If so, he must surely be aware that by the ecclesiastical law of this country, as well before the Reformation as since, an appeal from the bishop's court lies, and has always lain, to the Court of the archbishop—this Court of Arches—whose juris-

(1) See 1 Eliz. c. 2.

diction he now denies. And in like manner that an appeal lies to this Court from the jurisdiction of the bishop as exercised under the Church Discipline Act. And not only so, but he must be further aware that for a long series of years it has been the practice of the bishops to transfer suits commenced in their Courts at once to this Court of Arches, by the well-known form of letters of request, and thus save the expense and delay of two decisions in place of one. To this very court, therefore, any proceedings against Mr. Tooth, had they been commenced in the court of his diocesan, might, and in all probability would, according both to the ancient ecclesiastical laws of the realm and to modern enactment, have come either by way of transfer or by appeal. If so, what question is there of a secular court or an invasion of the rights of the church? Let me make my meaning plain. Before the Public Worship Regulation Act passed, suits for restraining irregularity in ritual were commenced in the court of the bishop under the Church Discipline Act. They may be so still, though I often see the misstatement that these courts have been abolished. Such were the well-known suits against Mr. Mackonochie (1) and Mr. Purchas. (2) But these suits were no sooner commenced in the bishop's courts than they were transferred, by the request in each case of the bishop, to this Court (the court of the Archbishop), to be here heard and determined. So that the jurisdiction of this Court in the matters of ritual is not only an ancient jurisdiction dating from time immemorial, as well before the Reformation as after it; but it is the jurisdiction, and the only jurisdiction, to which in modern times, and down to the moment when Mr. Tooth has chosen to deny its authority, all questions of ritual have been referred. Has then the Public Worship Regulation Act robbed this Court of its claim to obedience in matters ecclesiastical? All that the Act has done is to arm it with new powers, and these only in the way of procedure. Can any reasonable man argue that the conferring of such powers as those, which did not alter or affect the jurisdiction of this Court, annihilated that jurisdiction?

The existence of these additional powers cannot secularize a court deriving authority solely from the archbishop of the province,

(1) Law Rep. 2 A. & E. 116; Law Rep. 2 P. C. 365; Law Rep. 4 A. & E. 279.

(2) Law Rep. 3 A. & E. 66; Law Rep. 3 P. C. 605.

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and whose only secular feature is that of being presided over by a layman. But this, again, is no new thing. A series of distinguished judges who have presided here in the last as well as the present century (and it needs not to inquire how much further back) testifies to the contrary, for they have without exception been laymen and lawyers. The chancellors or officials who preside in the bishop's courts are with few exceptions up to the present hour also lawyers, and whatever objection may be felt by any to such an arrangement, it at least is no novelty, and has been the act of the ecclesiastical authorities themselves, without interference from the state.

Mr. Tooth, therefore, denies the authority of the only existing courts in the kingdom which, subject to appeal, have any power to review and correct his proceedings, and I cannot consequently regard his claim to immunity from the judgments and orders of this Court as anything short of a claim to be himself the judge of the ritual which the Prayer Book has prescribed. If so, there is nothing that I know of to prevent him from a still further approach to the ritual of the unreformed church of Rome, if he can persuade himself that the language of the Prayer Book admits of it.

With regard to the supposed libel on the Court, to which the counsel for the complainants has referred, the Court would, I think, be hypercritical if it saw in anything that Mr. Tooth has said a libel upon it. A court should not be over zealous in vindicating itself against improper language or unjust charges. The true protection of all courts lies in the general estimation and respect in which they are held, and that estimation is not, I think, imperilled by anything which has fallen from Mr. Tooth. I have only to add that Mr. Tooth must pay the costs of this application.

On the 10th of January the proctors for the complainants filed in the registry a præcipe for significavit. Afterwards Mr. Tooth's contempt having been duly signified to the Queen in Chancery, a writ de contumace capiendo, directed to the sheriff of Surrey and returnable in the Queen's Bench Division on the 16th of April, issued out of the Petty Bag Office (1), and under it Mr.

(1) The writ was under the Chancery Common Law seal.

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Tooth was, on the 22nd of January, arrested and lodged in Horsemonger Lane Prison.

On Sunday, the 16th of February, divine service, according to law, was, without any opposition being offered, performed in St. James Church, Hatcham, by the curate appointed by the Bishop of Rochester.

Feb. 17. *Shaw* appeared on behalf of the complainants, and stated that as the curate appointed by the Bishop of Rochester to officiate in the church of St. James, Hatcham, had obtained possession of the church, and, without any opposition being offered, performed divine service there according to law, on the previous Sunday, the complainants desired to testify their consent to any order the Court might in the circumstances think fit to make with regard to Mr. Tooth's release from prison, and, if the Court should consider that they should do so, were ready themselves to apply for such release, notwithstanding that Mr. Tooth had not cleared his contempt.

On the question of costs he submitted, that although the complainants were prepared to consent to the warrant of release being issued without previous payment of the costs occasioned by the contempt, the right to recover such costs by any other remedy than by process of contempt would not necessarily be taken away by the contempt being waived; but, if the Court should so direct, would, in accordance with the practice of the Court of Chancery (1), be recoverable as other costs in the cause.

[LORD PENZANCE. I think the practice of the Court of Chancery on this point is consistent with principle. I do not think there can be any doubt that the Court can treat the costs of the contempt as costs in the cause.]

The complainants wish this done in the present case, and ask that the order of Court authorizing the warrant of discharge to issue should direct that the discharge should be without prejudice to any other remedy for the recovery of the costs of the contempt; and that such costs should be recoverable as other costs in the cause. [He referred to 3 & 4 Vict. c. 93, s. 1.]

LORD PENZANCE. In the first place, I think there ought to be a formal application on behalf of the complainants, that Mr.

(1) *Anon.* 15 Ves. 174.

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Tooth be released. Secondly, I think that before the application be granted the Court ought to have before it an affidavit, however short, to the effect that has been stated, namely, that the services at the church of St. James, Hatcham, are now being performed by a nominee of the bishop of the diocese. The consent of the complainants to Mr. Tooth's release need not appear upon the affidavit, as the Court takes that upon the statement of counsel. The affidavit can be handed in when the order of discharge is drawn up.

Shaw then formally applied that Mr. Tooth be forthwith released from prison.

LORD PENZANCE. This is an application made under the provisions of 3 & 4 Vict. c. 93, for the release from custody of the Rev. Arthur Tooth.

In granting it I will shortly recall the circumstances and events which led to his imprisonment. Mr. Tooth had for some time past habitually performed divine service in his church in a manner which by several decisions of the Queen in Council had been declared unlawful.

Some portions of the ceremonial observed by him, such as the wearing of certain vestments and the position at the communion table occupied by him during the prayer of consecration, had given rise to much legitimate controversy. The language of the rubrics in the Prayer Book permitted of more than one interpretation, and although in the *Purchas Case* (1) (which was only argued on one side) the Court of Appeal had pronounced a decision adverse to Mr. Tooth's views, the matter was about to be again brought under the consideration of the same tribunal in the appeal then pending from Folkestone. (2)

Under these circumstances this Court, though obliged to obey the existing decision of the superior tribunal, by declaring Mr. Tooth's conduct in these matters unlawful, forbore to make any attempt to enforce that decision upon him.

But other portions of Mr. Tooth's ceremonial, such as processions with crosses, the use of incense, lighted candles on the communion table, the tolling of a bell during the communion service,

(1) Law Rep. 3 A. & E. 66; Law Rep. 3 P. C. 605.
(2) 1 P. D. 316.

the elevation of the cup and paten during the consecration prayer, and the singing of the Agnus Dei, were all matters which had been declared unlawful, and for the observance of which it will not be denied that there are no directions provided by the Prayer Book, while, on the other hand, the celebration of the Holy Communion when less than three communicants are present to receive it, is in plain and unambiguous words by the Prayer Book forbidden.

Mr. Tooth therefore was admonished to refrain from these practices. He continued them notwithstanding, and the Court had no alternative under the statute but to inhibit him from the performance of any service of the Church within the diocese of Rochester for the period of three months. This inhibition, it will be observed, was based on the continuance by Mr. Tooth (after admonition) of the observances last mentioned, and of those only, to the exclusion of the matters which were under appeal. And its purport was in no sense to affect the ecclesiastical status of Mr. Tooth, but only for a time and in respect of a particular diocese to suspend his ministrations.

Mr. Tooth refused to submit to this order of the Court. A clergyman was authorized by his bishop to conduct the services in his place, but Mr. Tooth declined to permit him to officiate. In this state of things the promoters of the suit applied to the Court, and claimed the exercise of its powers to enforce upon Mr. Tooth obedience to the judgment they had obtained, and, as I took occasion to say when the application was granted, the Court had really no discretion to refuse it. But it is important to bear in mind that it was granted not to punish Mr. Tooth for the past, but to enforce obedience for the future. It was necessary (if obedience to the law was to be maintained at all) that Mr. Tooth should not continue to perform the services of the church in the manner which had been condemned, and on the other hand, that the nominee of the Bishop of Rochester should be permitted to officiate in his place. But it was in Mr. Tooth's power at any moment after his arrest to regain his liberty, and not only that, but to get rid of the inhibition and be restored to the exercise of his duties in his parish, if he were willing to undertake to discontinue the practices complained of.

He has not thought it consistent with his duty to do so, and

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the result is, that he is still in confinement. Meanwhile the Court is informed that possession of the church has been obtained by the clergyman whom the bishop has authorized, and divine service is now performed there in a manner consistent with the law.

This statement of facts renders the course now to be taken by the Court, in my opinion, perfectly clear. There is, I am justified by the present application in thinking, no desire on the part of the promoters in the suit, and certainly none on the part of the Court, to punish Mr. Tooth, or press more hardly upon him than is necessary in order to secure that the church services should be legally performed, and as this end has been attained, there is no reason why Mr. Tooth should not be at liberty again. Let the order for his discharge be drawn up at once. It will issue out of the Registry on an affidavit being filed to the effect that divine service is now performed in the church of St. James, Hatcham, by the clergyman nominated for that purpose by the Bishop of Rochester.

With reference to what the counsel for the complainants has said as to the costs of the contempt, I think the order when drawn up should contain a proviso, that notwithstanding the order all remedies which exist with regard to costs should continue and should be available. The result will be that the costs of and incident to the respondent's contempt will be recoverable in the same manner as other costs in the cause, and that the order of discharge will be without prejudice to the rights of the complainants for the recovery of such costs.

The warrant of discharge issued on the same 17th of February, upon an affidavit made by a member of the firm of proctors for the complainants, and containing substantially the following allegations, being filed:—

The said Rev. Arthur Tooth having been pronounced to be contumacious and in contempt by this Court, and the said contempt having been signified, a writ de contumace capiendo thereupon issued to the sheriff of Surrey, under which the said Arthur Tooth was duly arrested, and was lodged in Horsemonger Lane Prison, where he now remains.

On the occasion of his having been so pronounced in contempt, affidavits were

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read shewing, amongst other things, that he had not only taken part in the performance of divine service at the church of St. James, Hatcham, himself since the service of the inhibition issued against him, but had also obstructed the clergyman appointed by the bishop of the diocese to perform divine service at the said church, and prevented his performing it.

I am informed and believe that on Sunday last divine service was performed by the clergyman appointed by the said bishop at the said church without obstruction and opposition, and there is reason to hope that no further obstruction will be offered thereto, and that the said clergyman will be able to discharge without opposition the duties to which he has been appointed by the bishop during such time as the inhibition shall continue in force.

The minute of the decree made by the Court on the application for Mr. Tooth's discharge was, so far as material, in terms as follows:—

Feb. 17. Complainants' agent filed notice of motion on behalf of complainants, and prayed that the Rev. Arthur Tooth, the respondent, or party complained of, be released from prison, there being no longer any obstruction to the performance of divine service in the church of the parish of St. James, Hatcham, and the judge having heard counsel thereon, ordered and decreed, subject to an affidavit in support of the application being filed, that the said Rev. A. Tooth be forthwith released by the consent of the complainants, and without previous payment of the costs of his contempt, but without prejudice to any other remedy of the said complainants for the said costs, and that such costs shall be recovered in the same manner as all other costs in the cause.

Proctors for complainants: *Moore & Currey.*

[IN THE COURT OF APPEAL.]

March 5.

WALLIS *v.* WALLIS.

Practice—Appeal from Order for Alimony—Divorce Court Act, 1857 (20 & 21 Vict, c. 85), *ss.* 55, 56—*Judicature Act,* 1873, *s.* 19—*Appellate Jurisdiction Act,* 1876 (39 & 40 Vict. c. 59), *s.* 20.

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The Court of Appeal has no jurisdiction to entertain an appeal from an order of the Judge Ordinary of the Divorce Court granting alimony, though the appeal was presented before the passing of the Appellate Jurisdiction Act, 1876; but the appeal must be brought to the full Court of Divorce.

IN January, 1873, Mrs. Wallis obtained a decree for judicial separation on account of the adultery of her husband. In June, 1875, she filed a petition for permanent alimony. The husband put in an answer on the 2nd of September, 1875, and a further answer on the 15th of October, 1875; and the application was referred to the registrar, who, on the 26th of April, 1876, made

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an order for 150*l.* per annum permanent alimony. The husband appealed by way of summons against this order, and on the 27th of June, 1876, the President of the Probate, Divorce, and Admiralty Division heard the summons in his private room, and dismissed it with costs.

The husband, on the 4th of July, 1876, appealed to the Court of Appeal from this order of dismissal.

March 5. *Inderwick, Q.C.*, for the appellant.

Sir H. James, Q.C. (*Dr. Tristram* with him) took a preliminary objection. The appeal ought to be to the full Court of Divorce, and the Court of Appeal has no jurisdiction. The old practice was governed by the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 22, 55, 56, under which there was in all cases an appeal from one judge to the full Court; but no appeal lay to the House of Lords, except from a final order of the full Court, the decisions of the full Court on appeals from orders made by the Judge Ordinary being final. Then, the 19th section of the Judicature Act, 1873, gives a general right of appeal; but the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20, provides that where by any Act the decision of any Court or judge is to be final, no appeal shall lie to the Court of Appeal. The case is similar to *Westhead* v. *Westhead.* (1)

Inderwick, Q.C., contrà. This appeal was presented before the Appellate Jurisdiction Act received the royal assent.

[JAMES, L.J. Could you, apart from that Act, omit the intermediate appeal to the full Court?]

There is nothing in the 19th section of the Judicature Act, 1873, to make the intermediate appeal necessary.

JAMES, L.J. I am of opinion that this case is governed by the clear words of 39 & 40 Vict. c. 59, s. 20, and cannot be distinguished from *Westhead* v. *Westhead.* (1) It is true that the appeal was presented before the passing of the Appellate Jurisdiction Act, 1876; but that Act contains no saving of pending appeals. We cannot give ourselves jurisdiction when the legislature has taken it away.

MELLISH, L.J., concurred.

(1) Ante, p. 1.

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BAGGALLAY, J.A. I am of the same opinion. I think also that, apart from the Appellate Jurisdiction Act, the 50th section of the Supreme Court of Judicature Act, 1873, would have been fatal to the appeal.

Solicitor for appellant: *Wallis.*

Solicitors for respondent: *Browne, Kidder, & Son.*

[IN THE COURT OF APPEAL.]

March 5.

GLADSTONE *v.* GLADSTONE.

Practice—Appeal—Order under 22 *&* 23 *Vict. c.* 61, *s.* 4—*Divorce Court Act,* 1857, *ss.* 55, 56—*Appellate Jurisdiction Act,* 1876, *s.* 20.

An appeal from an order as to the custody of children made under 22 & 23 Vict. c. 61, s. 4, after a final decree for dissolution of the marriage of the parents, must be brought to the full Court of Divorce, and not to the Court of Appeal.

THIS was an appeal by Major Gladstone, the respondent in a divorce suit, from an order of the President of the Probate, Divorce, and Admiralty Division dated the 8th of August, 1876.

The wife had obtained a decree absolute for dissolution of the marriage, and the order related to the custody of the infant child of the marriage. The decree nisi for dissolution, made on the 6th of August, 1874, allowed the mother to retain the custody of the child until further order. In March, 1876, Major Gladstone moved to have the custody of the child intrusted to another person. Mrs. Gladstone, who had married again, did not oppose the appointment of some third party to have the care of the child; and on the 21st of March an order was made referring the matter to the registrar. The registrar made a report approving of a Mrs. Handcock as a proper person, to which the wife assented. Major Gladstone opposed; but the president, on the 8th of August, 1876, made an order that Mrs. Handcock should have the custody of the child.

Inderwick, Q.C. (*Searle* with him), objected that the appeal ought to have been to the full Court in the Probate and Divorce Division: *Westhead* v. *Westhead* (1); *Wallis* v. *Wallis.* (2)

(1) Ante, p. 1. (2) Ante, p. 141.

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Pritchard, for the appellant, contrà. There is no right of appeal to the full Court. The Divorce Act, 1857 (20 & 21 Vict. c. 85), by s. 35, gave power to the Court to provide for the custody, maintenance, and education of the children, either by interim order pending the suit or by the final decree. Such an interim order might be made by the Judge Ordinary alone; the directions in the final decree could not. Then s. 55 provides that an appeal from a decision in any matter "which according to the provisions aforesaid," could be made by the Judge Ordinary alone should be to the full Court, whose decision should be final. It was by the subsequent Act, 22 & 23 Vict. c. 61, s. 4, that authority was given to make orders as to the children after the final decree. That section does not give any right of appeal; and s. 55 of the former Act cannot apply to an order made under it, for it is not an order made by the judge "according to the provisions aforesaid," but under powers conferred by a later statute. There is, therefore, a right of appeal under the Supreme Court of Judicature Act, 1873, s. 19, and the Appellate Jurisdiction Act, 1876, s. 20, has no application.

JAMES, L.J. I am of opinion that the 4th section of the Act 22 & 23 Vict. c. 61, was only meant to extend the period during which under the Act of 1857 an order relating to the children might be made, and not to give the power of making a new kind of order having different incidents from an order made under the former Act. If so, the provision of the 55th section of the Act of 1857 applied to an order like the present, and that being so, the case is the same in principle as *Westhead* v. *Westhead* (1) and *Wallis* v. *Wallis* (2), which we have just decided.

MELLISH, L.J. I am of the same opinion. It appears to me that the Act 22 & 23 Vict. c. 61, s. 4, was intended to enable the Court to make after final decree an order as to children which should have the same effect and be subject to the same rules as if it had been made before the final decree.

BAGGALLAY, J.A., concurred.

Solicitors for appellant: *Park, Nelson, & Morgan.*
Solicitors for respondent: *Lewis & Whitsed.*

(1) Ante, p. 1. (2) Ante, p. 141.

[IN THE COURT OF APPEAL.]

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April 24.

THE CARGO EX SCHILLER.

Saving Life—Salvage—Liability of Cargo—17 & 18 *Vict. c.* 104, *s.* 458.

A German steamship was wrecked in British waters, and the lives of ten passengers and of some of her crew were saved by certain boats. Subsequently, divers employed by the owners of cargo in the steamship succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners, masters, and crews of the boats against the owners of the specie:—

Held, by James and Baggallay, L.JJ., affirming the judgment of the Judge of the Admiralty Division (Brett, L.J., dissenting), that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie.

6 P D 63
8 P D 114

THE German steamship *Schiller*, on the 7th of May, 1875, ran on one of the rocks of the Scilly Islands, and soon afterwards sank in deep water. Ten of the passengers and some of the crew were picked up and saved by boats from the Scilly Islands. Only small portions of the hull and stores of the *Schiller* were saved; but some time after the ship was lost, the owners of some specie on board employed divers, and at great trouble and expense recovered four barrels of specie, the value of which was 40,000*l*. The owners, masters, and crews of the boats which had saved the ten passengers then instituted a cause of salvage against the owners of the specie, claiming remuneration.

The Judge of the Admiralty Division held that the cargo was liable to pay salvage, and awarded to the salvors, 500*l*. The facts are stated in detail in the report of the case in the Court below. (1).

The owners of the cargo appealed.

1876. Dec. 8, 11. *Butt, Q.C.*, and *O. Lodge*, for the owners of the cargo. This claim is made under the provisions of the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 458. Before this statute the Court of Admiralty was, no doubt, in the habit of awarding a larger sum for salvage where life had been saved, but the Act merely confirmed that practice, leaving it as it had been, that if

(1) 1 P. D. 473.

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the ship or any part was saved, the ship paid salvage, if the cargo was saved the cargo paid; but passengers have nothing to do with the cargo, and each passenger ought to pay for being saved, or the salvors may be paid out of the Mercantile Marine Fund. These salvors can have no more claim on the cargo saved than they could have for work done to the ship. They never in any manner offered to assist the owners of the cargo, who might have spent much money and have recovered nothing, but lay by to see the result and then make this claim.

The Admiralty Advocate (*Dr. Deane, Q.C.*) and *W. G. F. Phillimore*, for the plaintiffs. The 458th section of the Merchant Shipping Act expressly provides for the payment by the owners of the cargo for services rendered in saving the lives of the persons belonging to a ship stranded on the shore of the United Kingdom. Even if the wreck is in the hands of the owner, the law, under s. 450, takes hold of it in order to see that the liabilities are satisfied. The owner cannot take it without discharging his duties. Wherever the ship is the receiver of wrecks is to take charge; and s. 468 shews how the salvors are to be paid. The express object of that section was that those who save life should be in all cases rewarded. Had these boats not stopped to pick up these passengers they would probably have got something from the wreck, and then they must have been paid. If nothing has been saved, then they are, under s. 459, to be paid out of the Mercantile Marine Fund. If there was any doubt, it has been settled by the case of *The Fusilier* (1).

The policy of the law is clearly that those who save life are to be rewarded, and the law has been altered accordingly: 25 & 26 Vict. c. 63, s. 59. The cases of *The Cairo* (2) and *The Coromandel* (3) shew that salvage for saving life is always to be given. Suppose that this specie had been raised by strangers they would have had salvage, and so must these salvors: *The Willem III.* (4) Under s. 458 everything is charged.

Butt, Q.C., in reply. The words of s. 458 mean that each must pay for that which concerns him, otherwise the owner of the cargo may have to pay for services rendered to the ship, which is absurd.

(1) 3 Moo. P. C. (N.S.) 51; 1 Br. & L. 341.
(2) Law Rep. 4 A. & E. 184.
(3) Sw. 205.
(4) Law Rep. 3 A. & E. 487.

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The decision in the case of *The Fusilier* (1) is very doubtful, but there property was salved. In order to impose a new and unreasonable liability the enactment must be quite clear. If the owners of the cargo ought to pay for saving the lives of the passengers, they ought to be liable to be sued for it; but can such a proposition be maintained? It would be as reasonable to make one passenger pay for the saving the lives of the others as to make the owners of the cargo pay.

Cur. adv. vult.

April 24, 1877. BRETT, L.J. In this case, whilst ship and cargo were in danger, the plaintiffs saved the lives of fifteen persons, some of whom were of the crew of the ship, and others were passengers on board her. But after such lives were saved, the ship and cargo sunk in deep water, and all who had at any time tried to save ship and cargo abandoned any further attempt to do so. Some time afterwards, the defendants, who were owners of a part of the sunken cargo, which was valuable specie, engaged a staff of divers and workmen, and at great expense raised and recovered four barrels of such specie of the value of 40,000*l.* The claim in the suit was made against the defendants, as owners of the specie, by the plaintiffs, as life salvors only, but no part of the ship or cargo was saved by any one who could, in respect of having saved it, have claimed salvage. The specie was not saved by any one who could claim salvage for saving it, nor was it liable to be seized and retained by the Admiralty in respect of any claim which could be made for saving it, and the question is whether, under the statute, the plaintiffs can enforce any claim against it for life salvage. In order to determine the true construction of the statute, let us first consider whether this specie was when it was raised from the bottom of the sea "wreck," even within the extended meaning given to the term by the statute 17 & 18 Vict. c. 104, s. 2: "Wreck shall include jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water." It was not "wreck" in the common law meaning of the word. "Nothing shall be said wreccum maris but such goods only which are cast or left on the land by the sea:" *Sir Henry Constable's Case.* (2) The case goes on to say

(1) 3 Moo. P. C. (N.S.) 51; 1 Br. & L. 341. (2) 5 Rep. 106 a.

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"Flotsam, is when a ship is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan (vel potius ligan) is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again." This specie never was within any of these definitions, and even if it were, would be taken out of them by the fact of its being in the possession of the owner before it was or could be taken possession of by anyone else. For in the same case (1) the reason is given why such things were given to the king. "Note, reader, at first the common law gave as well as wreck, jetsam, flotsam, lagan, upon the sea, as estray, &c., treasure trove, and the like, to the king, because, by the rule of the common law, when no man can claim property in any goods, the king shall have them by his prerogative." Applying this principle to the former definitions, it seems to me that nothing can be considered to be flotsam, jetsam, or lagan, within any effective legal definition of those things, if it has never been taken possession of by any one but the true owner. This specie was once "derelict," but ceased to be so the moment the true owners of it resumed the exercise of their rights of ownership and began to endeavour to recover it, whilst no one else was endeavouring to save it. This specie was, therefore, in my opinion not "wreck" within the meaning of the statute at the time when it was recovered by its owners. If so, no receiver of wreck could legally interfere with it or with the owners of it in any respect. Even if it were wreck within the meaning of the statute at the time when it was recovered, the only relation to it of a receiver of wreck could be that he would be entitled to have notice under s. 450 that the owner had found it and had taken possession of it.

The next matter to be substantiated is that, independently of the statute, no claim for salvage of any kind could be enforced against this specie by anybody. It is true that an action in

(1) At fol. 108 b.

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personam might, under certain circumstances, be maintained in the Admiralty Court for salvage (see *The Hope*, 3 C. Rob. 215, and *The Trelawney*, in a note to that case), it being understood that the monition spoken of in those cases was then the mode of initiating a suit in personam in the Court of Admiralty. But in both those cases property had been saved, so as to give a claim for salvage. In both, therefore, if the property had come within the jurisdiction of the Admiralty Court, it might have been seized, and an action in rem might have been prosecuted. Both are, therefore, consistent with what was said in *The Thetis* (1) and *The Neptune* (2), that salvage is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea, under the responsibility of making restitution and with a lien for their reward. This shews that the foundation of the Admiralty jurisdiction in the awarding of salvage is, the power of enforcing the maritime lien obtained on property saved by salvors. This is in terms declared to be the foundation of the jurisdiction in *The Zephyrus* (3): "The jurisdiction of the Court in salvage causes is founded upon a proceeding against property which has been saved." The importance of thus defining the foundation of the jurisdiction in salvage matters is that it shews why the Admiralty had no jurisdiction to entertain claims for life salvage. In *The Fusilier* (4) Dr. Lushington thus summed up the law and the reasons for it: "I will begin by stating what was the law of the Court respecting life salvage before any statute was passed on the subject of salvage. Where no property had been saved and life alone had been preserved from destruction, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding in rem in the ancient foundation of a salvage suit. In some cases it happened that one set of persons exclusively saved life, and another wholly distinct set saved the ship and cargo; but in this case also the salvors of life could not render the property amenable to their claims. But where life and property had been saved by one set of salvors, it was the practice of the courts to give a

(1) 3 Hagg. (Adm.) 14, see p. 48.
(2) 1 Hagg. (Adm.) 227, see p. 236.
(3) 1 Wm. Rob. 329, at p. 331.
(4) 1 Br. & L. at p. 344.

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larger amount of salvage than if the property only had been saved; and this doctrine rests on high authority. The practice, too, was that all the property saved should be liable to pay such increased rate of salvage; the ship, the freight, and the cargo, each in proportion to its value." It seems to me obvious that in this recapitulation of the law of salvage the word "saved" is used in the sense of "salved," i.e., "saved by salvors." The reasoning depends on that meaning being given to the word "saved." And in all cases and books dealing with this branch of law the word "saved" is, as I believe, used in the sense of "salved." This statement of the law shews clearly that, independently of the statute, no claim could be substantiated in the present case, because no property has been salved by any one. There is no property which, irrespective of the statute, could be seized by way of lien, so as to give the Admiralty Court any jurisdiction to enforce any lien against it, or to deal with it at all. The question is, whether the statute has given to the Court of Admiralty a right to deal with any property with which it could not have dealt at all before the statute—which it had no jurisdiction to seize or detain before the statute.

The former statute (9 & 10 Vict. c. 99, s. 19) enacts that every person who shall act or be employed in any way whatsoever in the saving or preserving of any ship, or of any part of the cargo thereof, or of the life of any person on board the same, &c., shall be paid a reasonable reward or compensation by way of salvage for such service by the commander or owner of the said ship, or by the merchant whose ship, vessel, or cargo shall be so saved. If the reward to be paid had been simply a money reward, it would have been unnecessary to use the phrase "by way of salvage." That phrase introduces the law of salvage. The enactment that the reward shall be "by way of salvage" gives jurisdiction to the Admiralty, but the jurisdiction of the Admiralty is founded on the possibility of a proceeding in rem. Moreover, among the classes to pay are the owners of a ship saved, and the owner of a ship or cargo saved. So that the whole section is founded on the assumption that property has been saved. It cannot be doubted, as it seems to me, that "saved" is used for "salved by salvors," when the compensation is to be "by way of salvage." The enactment

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does not give a new subject-matter on which the Admiralty may enforce a lien, but gives a new cause on service in respect of which the Admiralty may enforce a lien upon the same subject-matter as before. The sections 458 and 459 of 17 & 18 Vict. c. 104, seem to me to use the same technical phraseology in dealing with the doctrine of salvage as has been invariably used in every case, treatise, and statute on salvage. The word "saved" in such phraseology is used for "salved," i.e. "saved by salvors." This is shewn in s. 458 by the statement that there shall be payable to the person by whom such services or any of them are rendered "a reasonable amount of salvage." It is not said a reasonable compensation, but a reasonable amount of salvage. So in s. 459 it is salvage which is payable, not compensation. And the mode of enforcing the claim in the last resort is by sale under s. 469. The whole remedy is evidently founded on Admiralty remedy, which, though it does not absolutely shut out a remedy by suit in personam either in the Admiralty Court, or, mayhap, in some other division of the High Court, yet shews that it is a remedy for a salvage claim, which imports, as is stated in *The Zephyrus* (1) and in *The Fusilier* (2), the possibility of a suit in rem. The case of *The Fusilier* (2) is in its facts consistent with this view of the statutes. In it cargo was salved; it is not therefore, as to its facts, an authority against the defence in this case. Neither, as it seems to me, is any of the reasoning adverse to the contention of the defendants in the present case. The decision in *The Fusilier* (2) is in reality founded on the view that the statute was dealing with the causes on services for which salvage reward might be awarded, and not with the subject-matter in which the reward was to take effect. That is the reason why the strong decision is arrived at that the omission of the word "cargo" in s. 459 does not alter the law that cargo was one subject-matter of a grant of salvage reward. If it did not alter the law as to what was subject-matter of a salvage lien in that case, it does not in this. The case of *The Cairo* (3), upon the facts stated in the judgment, goes no further than *The Fusilier* (2), as the ship had received salvage services, if it is taken as a decision. "The construction," says Dr. Lushington in

(1) 1 Wm. Rob. 329. (2) 3 Moo. P. C. (N.S.) 51; 1 Br. & L. 341.
(3) Law Rep. 4 A. & E. 184.

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the latter case (1), "that cargo should not contribute to life salvage, would work a great change in the law, and go much beyond the grievance which existed." "The legislature," says Lord Chelmsford (2), "in dealing with the subject of life salvage, must be taken to have been aware of this practice, and to have intended to confer upon the Court of Admiralty a power of doing that directly which they had been so long in the habit of doing indirectly." But what the Admiralty had been in the habit of doing indirectly was to give reward for life salvage, when it could be paid out of or by means of property which had itself been saved, in the sense of having been salved by salvors. The Admiralty had never assumed jurisdiction to deal with property which had never been salved by any salvor. The doctrine, therefore, does not include the present case. There is ample scope for the application of the statute within the doctrine, without holding that it includes the present case. It seems to me contrary to the ordinary principles of construction to say that, without words more expressive than any used in this statute, property, which before the statute was not the subject-matter of any salvage suit—which was not capable of being properly brought within any jurisdiction of the Admiralty Court—should now be swept into such jurisdiction, and be made the subject of such a suit. It is true that colour is given to a contrary view by Dr. Lushington in *The Coromandel*. (3) "I apprehend," he says, "the legislature, in the first place, was well aware that there were many instances in which life was saved and property entirely lost, and that consequently there was no reward which could, as a matter of right, be claimed by those who, perhaps at the risk of their own lives, had saved the lives of others, and they meant to provide for that contingency in the first instance." My belief is that Dr. Lushington was there alluding to the power given to the Board of Trade to award a sum of money, where no property or an insufficient amount of property is salved. If not, the facts of the case did not raise the point, for the ship was salved. In such view, the statement would be a dictum of authority, and no more, and I could not agree with it.

(1) 1 Br. & L. at p. 345. (2) 3 Moo. P. C. (N.S.) at p. 71.
(3) Swab. 205, at p. 207.

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Upon that which I apprehend to be the true construction of the statute, arrived at from the considerations stated above, I am of opinion that no salvage claim could be legally enforced against the specie or its owners in this case, and therefore that the judgment appealed against should be reversed.

BAGGALLAY, L.J. The state of the law affecting life salvage as it existed, or was recognised, prior to the passing of the Merchant Shipping Act, 1854, was described by Dr. Lushington in the passages of his judgment in the case of *The Fusilier* (1), to which Sir Baliol Brett has referred, and it is unnecessary for me to add to the description so given, nor do I propose to refer further to the circumstances of the present case than to observe that the claim of the plaintiffs is resisted by the defendants upon the grounds, first, that, having regard to the provisions of the Act of 1854, the claims of life salvors can in no case be enforced against the owners of cargo, but only against the owners of the ship, or, failing that, against the Mercantile Marine Fund; and, secondly, that if such claims can to any extent be enforced against the owners of cargo, life salvors are not by law entitled to any remuneration as against cargo which has not been salved, in the ordinary acceptance of the expression, either by themselves or by any other persons, but has been subsequently recovered by agents employed by the owners for that purpose. As regards the first of these points, it was admitted that adverse decisions had been given both in the Court of Admiralty and in the Privy Council, but it was urged upon us, as it had been upon the Judge of the Admiralty Court, that these decisions should be reviewed. The Judge of the Admiralty Court gave judgment in favour of the plaintiffs, and I am of opinion that his judgment should be affirmed.

The substantial questions for our consideration are as to the effect of the provisions of the Act of 1854, and to that I propose to at once address myself. Now, omitting the references to the saving of "wreck," which do not appear to me to have any bearing upon the questions now under consideration, the 458th section enacts that whenever a ship is stranded or otherwise in distress,

(1) 3 Moo. P. C. (N.S.) 51; 1 Br. & L. 341.

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and "services are rendered by any person, (1.) in assisting such ship or boat; (2.) in saving the lives of the persons belonging to such ship or boat; (3.) in saving the cargo or apparel of such ship or boat or any portion thereof," "there shall be payable by the owners of such ship or boat, cargo, apparel or wreck, to the person by whom such services, or any of them, are rendered, or by whom such wreck is saved, a reasonable amount of salvage." Now these words are very wide; if any one of the three classes of service is rendered, for instance, if the saving of life is the only service, the owners of the several classes of property, ship, cargo, and apparel, are all made liable to pay a reasonable amount of salvage to the person rendering the service. This is the grammatical meaning of the words used in s. 458. I am unable to follow the argument that has been addressed to me, that the words creating or declaring the liability are to be read reddendo singula singulis. If the service of saving life had been omitted, there might have been some weight in the argument that the owners of ship, cargo, and apparel were to be respectively liable to the salvors of the property of which they were respectively the owners; but upon whom, if this principle is to be adopted, is the liability to be imposed in cases of the salvage being confined to life? It is clear from the terms of the section that the burden is to fall somewhere, and why, so far as the provisions of this section are concerned, should it be imposed upon the owners of the ship any more than upon the owners of the cargo? If the solution of the question depended upon the proper effect to be given to s. 458, and upon that alone, I think there could be no question as to the liability being imposed upon the owners of cargo as well as upon the owners of the ship.

But what is the nature and extent of the liability imposed? In the terms of the section, it is a liability to pay "a reasonable amount of salvage;" but is this to be construed as a general personal liability, to be enforced against the owners under any circumstances, whether the ship and cargo are lost are not, or as a liability capable of being enforced against, and therefore limited to the value of, the property, whether ship or cargo, saved from destruction; and if the latter be the true construction, is the

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liability limited to the value of the ship or cargo saved by salvors, as the expression is ordinarily understood, or are they to comprise also ship or cargo saved from destruction by other means, as by reason of the ship riding out the storm, or of the cargo being recovered through the exertions of the owners, or of persons specially employed for that purpose? The subsequent sections of the Act, when taken in connection with the 458th, throw much light upon these questions. In s. 459 we find a provision that, at first sight, gives rise to a doubt whether it was not the intention of the legislature to provide that the liability to the payment of life salvage should be confined to the owners of the ship, and should not extend to the owners of the cargo, and this view, as I have already said, has been pressed upon us by the counsel for the appellants. The provision in question is to the effect that life salvage shall be payable by the owners of the ship in priority to all other claims of salvage, and that where the ship is destroyed, or where the value thereof is insufficient to meet the amount of life salvage, the Board of Trade may award to the salvors, out of the Mercantile Marine Fund, such sums as it may deem fit, in whole or part satisfaction of the amount of salvage payable. Now it is, in the first place, to be remarked that, if it had been the intention of the legislature that liability in respect of life salvage should be confined to the owners of the ship, it is somewhat strange that it has not said so in plain terms, but has left it to be inferred from the terms of two sections which, in this view of the case, would be conflicting. Again, if the 459th section is to have the effect contended for by the appellants, it would follow that, in cases in which ship, cargo, and life are all saved by the same salvors (for the section is not confined to cases in which life alone is saved), the owners of cargo would be relieved from the liability to which under the old law they would have been subject—a result which would be contrary to the whole scope and scheme of the enactment, which was to increase, and not to diminish, the rewards for life salvage. But some reliance has been placed by the appellants upon that portion of s. 459 which provides that where the ship is destroyed, or where the value thereof is insufficient to meet the amount of life salvage, the Board of Trade may award to the

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salvors, out of the Mercantile Marine Fund, such sums as it may deem fit in whole or part satisfaction of the amount of salvage payable. Now these words taken per se do not, in my opinion, carry the argument, that the owners of the ship are alone liable, any further than the earlier words in the section to which I have already adverted, but they appear to me to negative any general personal liability of the owners of the ship; for if it had been intended by the legislature that there should be any such general liability of the owners, it is difficult to understand why, in the event of the ship being wholly or partially destroyed, they should be relieved from a liability primarily cast upon them, and that it should be imposed upon the Mercantile Marine Fund. Upon the whole, it appears to me that the true effect of s. 459 is merely to give, as against the ship, a priority to claims in respect of life salvage over all other salvage claims whatsoever, and to leave, as well to life salvors as to salvors of property, all such other rights and remedies as they might be entitled to, either under the old law or under the Merchant Shipping Act. And if it be the case that, upon the true construction of ss. 458 and 459, the liability of the owners of the ship is not a general personal liability, but is limited to the value of the property saved, it must follow that the same construction will hold good as regards the liability of the owners of the cargo; for in the 458th section, which creates the liability, no distinction is drawn between the nature of the liability of the owners of the ship and that of the owners of the cargo. But any doubts to which the words of the 459th section may give rise as regards the liability of the owners of the cargo are, in my opinion, removed by the language of the 468th section, which provides for the detention of the ship and the cargo and the apparel thereof, whenever any salvage is due in respect of services rendered in assisting such ship, or in saving the lives of the persons belonging to the same, and in saving the cargo or apparel thereof, thus following the three several services enumerated in s. 458. Why should the cargo be detained in a case in which there has been life salvage only, if the owners of such cargo are under no liability to pay or contribute to the amount due in respect of such life salvage?

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The 469th section also has the same bearing, for it provides for the sale of any ship, cargo, or apparel which has been so detained, and for the payment of the amount due.

Upon the consideration of these several sections of the Act, I am of opinion that the liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, and that such liability is not a general personal liability to be enforced in any circumstances whether the ship and cargo are lost or not, but a liability limited to the value of the property saved from destruction. The question remains, what is to be considered "property saved from destruction," and I am of opinion that, as regards the right of life salvors to claim a reasonable amount of salvage, it is immaterial whether the property saved from destruction has been saved by salvors, as the expression is ordinarily understood, or by other means. The words of the 458th section of the Act, which creates the liability, appear to me to apply equally to the one class of property as to the other. Reliance has been placed upon the use of the word "salvage," as indicating that the claim must be in respect of property saved by "salvors" as recognised by the old law, and that no right was conferred by the Act upon the life salvors against or in respect of any property which would not have been subject to claims for salvage under the old law. But having regard to the whole provisions and scope of the Act of 1854 and of 9 & 10 Vict. c. 99, which preceded it, I do not think that the word was used in the 458th section in the limited sense suggested. Indeed the section appears to me to contain a clear indication of the contrary, for the owners of ships and cargo are made liable when any one of the three services are rendered, and, consequently, when life has been saved, and there has been no salvage, in the limited acceptance of the term, of either ship or cargo; and in the 459th section the word "salvage" is clearly used to measure the reward or compensation to which the life salvor is entitled in cases in which, by reason of the total loss of the ship, no claim for salvage could have been enforced under the old law. In the result, I am of opinion that it was the intention of the legislature in passing the Merchant Shipping Act of 1854, not only to give a legislative

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sanction to the existing practice of indirectly rewarding salvors of life, when they were salvors of property also, but to remedy the injustice of the existing laws and practice, so far as they failed to provide reward for the saving of life, when unaccompanied by a saving of property, and that under the provisions of that Act the owners of all property saved, whether ship, cargo, or apparel, and however saved, are rendered liable, to the extent of the value of the property saved, for a reasonable amount of salvage in respect of life saved, even though the life salvors have in no respect assisted in the salvage of either ship or cargo. If the views which I have expressed of the changes effected by the Merchant Shipping Act in the law of life salvage are correct, it would follow that in the present case the claim of the plaintiffs for salvage is well founded, and that the decision of the Judge of the Admiralty Court should be affirmed.

It has been suggested, in the course of the argument, that the property recovered in the present case was "wreck." I do not think it was wreck within the meaning of the statute; but it appears to me to be immaterial to consider whether it was so or not—it was a portion of the property saved from destruction. If it was "wreck" a question might arise whether the claim of the life salvors was against more than the owners' interest in the "wreck," that is, whether it was not postponed to the fees of the receiver of wrecks, and possibly to other payments under the wreck clauses of the Act. The value of the recovered portions of the cargo is however much more than sufficient to meet all those claims and demands, and it is immaterial to consider their respective priorities. Several cases have been cited in the course of the argument, but I do not think it necessary to refer to them further than to say that, in my opinion, they do not support any views opposed to those which I have expressed. The case of *The Fusilier* (1) is the one which has been most discussed. In that case assistance had been rendered by a lifeboat, by two luggers, and by a steam-tug; the services rendered by them were distinct, and were different in character. The luggers claimed in respect of assistance rendered to ship and cargo, and made no claim for saving life; the

(1) 1 Br. & L. 341; 3 Moo. P. C. (N.S.) 51.

lifeboat service was in saving life alone; whilst the tug claimed both for saving life and for assistance rendered to ship and cargo; it was contended on behalf of the owners of cargo, that as regarded so much of the claim of the tug as was in respect of saving life, and as regarded the entire claim of the lifeboat, the liability to pay salvage was limited by the Merchant Shipping Act to the owners of the ship, but the Court of Admiralty in the first instance, and the Judicial Committee, on appeal, decided adversely to this contention, and salvage was awarded against the owners of cargo as well as against the owners of the ship. To this extent the same questions were raised as have been raised in the present case, and were decided adversely to the owners of cargo. In the views expressed by Dr. Lushington in the Court of Admiralty, and by Lord Chelmsford in the Privy Council, I entirely concur.

JAMES, L.J. I also am of opinion that the judgment of the Judge of the Admiralty Court ought to be affirmed. The Act of Parliament, in plain words, says that a life salvor is to be paid salvage, and that such salvage is to be paid by the ship and cargo —the only fund from which it could be paid. The judgments of Dr. Lushington, affirmed by the Privy Council, have established this, that (notwithstanding some apparent difficulty raised by the succeeding sections) such salvage is not to be thrown exclusively on the ship, but is to be borne rateably by the ship and cargo. There is nothing in the Act of Parliament which says, and nothing from which, in my opinion, it is reasonably to be implied, that the right of the life salvors is subject to a condition precedent, that some salvage service should be rendered by some one to the ship and cargo or either. No doubt the language of Dr. Lushington (1) is "saved the ship and cargo." The judgment does not say, and in my opinion could not have meant to say, "ship and cargo salved by the aid of a salvor." The word "saved" there means, according to my view of the language, that the ship and cargo has escaped from the peril in which it was and has come to shore, whether as wreck or otherwise. There is nothing unreasonable in making the owners of the ship and cargo pay for the

(1) 1 Br. & L. at p. 344.

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salvage of the lives on board, any more than there would be anything unreasonable in a law making a householder pay for the salvage of his inmates from a fire. But it would be more unreasonable to make the right of the life salvor to salvage depend on the fortuitous circumstance, that some other salvor unconnected with him had succeeded in rendering to ship or cargo salvage services unconnected with the life salvage. In the case of *The Coromandel* (1) the life salvage was rendered to a boat-load of men who had escaped from the ship—the other salvage was rendered miles away and hours afterwards by a totally distinct body of salvors. In the case of *The Fusilier* (2) some of the life salvors afterwards had something to do with the salvage of the ship and cargo, but that was a mere accident. The latter salvage service was of the slightest possible kind; and the owners of a boat, which had nothing whatever to do with that salvage, were decreed to participate in the life salvage paid by the ship and cargo.

This seems to me quite in accordance with reason and principle. If a ship is in distress and the persons who go to its rescue busy themselves, in the first instance, as they ought to do, exclusively with the salvage of lives, and while they are doing this by a change of weather a rising tide and a favourable breeze lift the ship and waft her into a safe cove, surely it is quite as reasonable and right that the ship and cargo, saved by the aid of God, and without further expense, should pay the life salvors as if they had been saved by a steam-tug coming up at the critical moment, or by some other salvage services for which they would have further to pay. In this case the ship was not saved, but the cargo was saved, that is to say, it remained in a place to which the owners had access and from which they were able to get it; and it appears to me to make no difference that the bullion has been brought to the surface by divers paid by the owner.

Doubtless in estimating the value of the service a large deduction might have to be made—a very liberal allowance, for the fact that the owners had to pay for somewhat special and speculative services in realizing it. But there can be no doubt in this case that, with every possible allowance on this head, the value of the

(1) Swab. 205. (2) 3 Moo. P. C. (NS.) 51; 1 Br. & L. 341.

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cargo was very large indeed—so large that the amount of salvage awarded appears to be a moderate percentage.

I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, lagan, and jetsam. The legislature tells mariners that if they exert themselves to save life, they shall receive reward on the principle of salvage, and to put a technical meaning on the words, so as to limit the operation of the enactment, would be "to keep the word of promise to the ear and break it to the hope."

Judgment for the plaintiffs affirmed.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

[IN THE COURT OF APPEAL.]

April 10.

IN RE JOHN HARRIS, DECEASED.
CHEESE *v.* LOVEJOY.

Practice—Supreme Court of Judicature Act, 1875, s. 22—*Annexing Exception to the Record.*

The Judge of the Probate Division having directed a jury to find in favour of a will, on the ground that the facts proved were no evidence of its having been revoked, and having pronounced in favour of the will, directed an exception to his ruling to be annexed to the record. There being no record to which it could be annexed, the Court of Appeal directed notice of appeal to be given.

THIS was an action to have the will and three codicils of John Harris, who died in May, 1876, proved in solemn form excluding the alterations and interlineations appearing on the face of the will and first codicil. The defence was that the instruments had been revoked.

The action was tried before Sir James Hannen with a jury, on the 2nd of March, 1877. The execution of the instruments was clearly proved. The will was dated in 1849, and the codicils in 1852. The testator had some years before his death struck through a considerable part of the will with a pen, leaving the

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writing quite legible, and had thenceforth treated them as being revoked, and left them lying about as waste paper in the kitchen The judge was of opinion that no case of revocation was made out, and some discussion took place whether it would be the best course for the judge to tell the jury that there was no evidence before them in support of revocation, or to direct them to find that there was no revocation. The latter course was adopted, and the jury, under the direction of the judge that the facts shewn in evidence were not evidence of revocation, found that the instruments were not revoked. The judge pronounced for the will and codicils, and directed that an exception to his ruling should be annexed to the record.

Inderwick, Q.C. (*C. A. Middleton,* with him), applied to the Court of Appeal for directions how the case could be brought before the Court of Appeal, there being no record to which the exceptions could be annexed.

The Court (James, and Mellish, L.JJ., and Baggallay, J.A.), directed that notice of appeal should be given, stating that if an order nisi was necessary the present order was to be considered as an order nisi, so as to save the time for appealing.

Solicitors: *Bridges, Sawtell, & Co.*

[IN THE COURT OF APPEAL.]

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THE FRANCONIA. (J. 67.)

*Collision at Sea—Jurisdiction of Court of Admiralty to entertain Proceedings in rem against a Ship for Damages for Loss of Life—*9 & 10 *Vict. c.* 93 *s.* 2—"*Damage done by any Ship*"—*Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 7.

An action was instituted against a foreign ship to recover damages for the death of the husband of the plaintiff alleged to have been caused by a collision brought about by the improper navigation of the ship proceeded against:—

Held, that the Court had jurisdiction to entertain the action, and on appeal this decision was affirmed by James and Baggallay, L.JJ. (Bramwell, and Brett, L.JJ., dissenting).

THIS was an action of damage instituted, on the 12th of February, 1877, on behalf of Ann Jefferey, the widow of James Jefferey, against the German steam-ship *Franconia*. The indorsement on the writ in the action was in terms as follows:—The plaintiff, as administratrix of James Jefferey, claims the sum of 1000*l.* against the steam-ship or vessel *Franconia* for damages for the death of the said James Jefferey and loss of his goods, occasioned by a collision which took place in the Straits of Dover, between the *Franconia* and the *Strathclyde*, on which he was a mariner, in the month of February last, caused by the negligence of those on board the *Franconia* (1).

An appearance under protest on behalf of the owners of the *Franconia* was entered in the action on the 15th of March last. (2)

March 24. *W. G. F. Phillimore* (*Benjamin, Q.C.*, with him),

(1) See *The Franconia* (2 P. D. 8), *The Queen* v. *Keyn* (2 Ex. D. 63), and *Harris* v. *The Hamburgh-Amerikanische Packetfahrt-Actien-Gesellschaft, Owners of The Franconia* (2 C. P. D. 173).

(2) The *Franconia* was never arrested in the action, but she had been arrested in another action for damage done to the *Strathclyde*, and she was released on the owners, through their solicitors, giving an undertaking to give bail to answer judgment in any actions for loss of life or personal injury that might be thereafter instituted by plaintiff's solicitors against the vessel, without prejudice however, to any objections the owners of the *Franconia* might thereafter raise in respect of any claim against the said vessel for loss of life or personal injury.

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appeared for the defendants under protest, and moved the judge in court to set aside so much of the writ of summons issued in the action as claimed damages for loss of life. This Division of the High Court has no greater jurisdiction in rem than the Court of Admiralty had before the passing of the Judicature Acts. (1) The only question, therefore, is whether the latter court ever possessed jurisdiction to entertain a claim for damages for loss of life. This question the defendants contend can only be answered in the negative. The decisions of this Court in the cases of *The Sylph* (2), *The Guldfaxe* (3), and *The Explorer* (4), and the judgment of the Judicial Committee of the Privy Council, in the case of *The Beta* (5), cannot be reconciled with the language of the judges of the Court of Queen's Bench in the subsequent case of *Smith* v. *Brown* (6). Not only is the decision in that case an express authority in favour of the defendants, but the principles there laid down with respect to the limited jurisdiction possessed by the Court of Admiralty have been more recently approved in other cases coming before the superior Courts of common law: *James* v. *London and South Western Ry. Co.* (7); *Simpson* v. *Blues* (8). The legislature never could have intended either that compensation for loss of life should be assessed otherwise than by a jury, or that the owners of a foreign ship should be liable in this country to an action to recover damages for loss of life occasioned by a collision on the high seas.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs, opposed the motion. The language used in the judgment of the Judicial Committee of the Privy Council in *The Beta* (5) is wide enough to support the jurisdiction of the Court. The decisions of the Judicial Committee have always been regarded with the greatest deference by all the courts in Westminster Hall: *General Steam Navigation*

(1) See the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 11, subs. 3.

(2) Law Rep. 2 A. & E. 24.

(3) Law Rep. 2 A. & E. 325.

(4) Law Rep. 3 A. & E. 289. In this case there was an appeal to the Judicial Committee of the Privy Council. Before the appeal came on to be heard the Court of Queen's Bench had given judgment in *Smith* v. *Brown* (Law Rep. 6 Q. B. 729). The judicial committee thereupon [Feb. 2, 1872] directed the hearing of the appeal to stand over, and no further proceedings were ever taken.

(5) Law Rep. 2 P. C. 447.

(6) Law Rep. 6 Q. B. 729.

(7) Law Rep. 7 Ex. 187.

(8) Law Rep. 7 C. P. 290.

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Co. v. *British and Colonial Steam Navigation Co.* (1), and were absolutely binding upon the Court of Admiralty. No doubt the decision of one of the superior courts of common law on a case coming before it on prohibition, so far as that particular case is concerned, is binding on the court prohibited; but in the present case there can be of course no question of a prohibition. The Court therefore ought to adhere to the opinions expressed by the present judge of the Court of Admiralty in *The Guldfaxe* (2), and *The Explorer* (3), more especially as *Smith* v. *Brown* (4) is merely the decision of a court of first instance. It is not unreasonable to suppose that the legislature intended to confer jurisdiction in cases similar to the present on the Court of Admiralty; for if this Court has not jurisdiction to entertain a claim for damages for loss of life, there is, as the law is at present settled, no other court in the kingdom where such damages can be recovered from foreign shipowners not within the jurisdiction: *Harris* v. *Owners of The Franconia.* (5) This Court has undoubted jurisdiction in suits for limitation of liability of the defendant in a cause of damage for personal injury, but in such cases no jury has ever been summoned: Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 505, 514, 515; Richardson's Dict. Damage; Admiralty Court Act, 1861 (24 Vict. c. 10), s. 13; *The Ruckers* (6); *The Alexandria.* (7)

Phillimore, in reply:—

The decisions of the Judicial Committee of the Privy Council are not binding on the High Court: *Merchant Shipping Co.* v. *Armitage.* (8)

Cur. adv. vult.

April 17. SIR ROBERT PHILLIMORE. In this case Ann Jefferey, the widow and administratrix of James Jefferey, deceased, claims the sum of 1000*l.* against the steam-ship or vessel *Franconia*, for damages for the death of the said James Jefferey and loss of his goods, occasioned by a collision which took place in the Straits

(1) Law Rep. 3 Ex. 330.
(2) Law Rep. 2 A. & E. 325.
(3) Law Rep. 3 A. & E. 289.
(4) Law Rep. 6 Q. B. 729.
(5) 2 C. P. D. 173.
(6) 4 C. Rob. 73.
(7) Law Rep. 3 A. & E. 574.
(8) Law Rep. 9 Q. B. 99.

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of Dover between the *Franconia* and the *Strathclyde*, on which he was a mariner, in the month of February, in last year, the collision being caused by the negligence of those on board the *Franconia*. The defendants, the owners of the *Franconia*, now move the Court to set aside so much of the writ of summons issued in this action as claims damages for loss of life. It is not disputed that the Court has jurisdiction, so far as damages for the loss of goods are concerned; but two questions appear to be raised in these proceedings, first, whether the Court can entertain an action for damages on account of the death of a party; and, second, whether the claimant may proceed in rem, that is, against the ship for such damages. The ship was not arrested in this action, but when she was arrested in other actions it was agreed that she should be released on certain terms, which made it necessary for the defendants to appear and give bail in this action. These terms were, first, 8*l.* per ton to be paid into court on the registered tonnage of the ship; second, bail to be put in in two other actions; and, third, the owners of the *Franconia* to appear and give bail in every action for loss of life and personal injury. (1) The case is to be considered as if the ship was under arrest, and the proceedings were in rem, the right being reserved to contest the jurisdiction. The 7th section of the 24 Vict. c. 10 (the Admiralty Court Act, 1861), is as follows: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The construction of this section has been the subject of much litigation, and unfortunately of conflicting decisions. The 9 & 10 Vict. c. 93 and 27 & 28 Vict. c. 95, s. 2, first created the right of action at common law for compensating the families of persons killed by accident. These Acts did not confer jurisdiction in this matter upon the High Court of Admiralty. It is the 7th section of the 24 Vict. c. 10, to which I have just referred, which conferred, if any section of any Act did confer, such jurisdiction upon that Court.

I think it right to observe in limine, that in certain cases it is clear that the Court of Admiralty would have had jurisdiction to award and distribute damages for loss of life or personal injury happening in a collision. The Merchant Shipping Act, 1854, s. 514,

(1) See *Harris* v. *The Hamburgh-Amerikanische Packetfahrt-Actien-Gesellschaft* (Law Rep. 2 C. P. D. 173.)

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gives jurisdiction in such a matter to the Court of Chancery and other courts, and the Admiralty Court Act, 1861, s. 13, confers the same jurisdiction on the High Court of Admiralty when the ship or proceeds are under arrest; and, as I observed in the case of *The Guldfaxe* (1), it is clear, therefore, that if in this very case of damage there had been several claimants, including the present plaintiff, and if the defendants had instituted a suit in this court for the purpose of limiting the amount of their liability, and for the distribution of such amount rateably amongst the claimants, it would have been the duty of the Court to have entertained the suit.

I will now briefly refer to the principal judgments on this subject.

In the case of *The Sylph* (2), decided in 1867, I ruled, following the opinion of Dr. Lushington, that the Court of Admiralty had jurisdiction under the Admiralty Court Act, 1861, to entertain a cause for personal damage done by a ship, and I stated my reasons. This judgment was not appealed from. In the following year, 1868, I again had occasion to consider the question, and stated my reasons at length for considering that the same Court had jurisdiction to entertain a suit for the recovery of damages by the personal representative of a person killed in a collision between two vessels.

In 1869, in the case of *The Beta* (3) I again held that this Court had jurisdiction in a cause of damage instituted against a ship for personal damage. From this judgment an appeal was prosecuted to the Judicial Committee of the Privy Council in 1869, and that Court, consisting of Lord Romilly, Sir W. Erle, Sir James Colville and Sir Joseph Napier, said: "The words of the 7th section of the Admiralty Court Jurisdiction Act, 1861, which had been referred to, clearly include every possible kind of damage. Personal injuries are undoubtedly within the words 'damage done by any ship.' The case of *The Sylph* (2), which has been referred to, and in which it was so held, has not been appealed from." In 1870, in the case of *The Explorer* (4), I entertained a suit brought against a foreign ship by the personal representative of persons killed in a collision. There was,

(1) Law Rep. 2 A. & E. 325.
(2) Law Rep. 2 A. & E. 24.
(3) Law Rep. 2 P. C. 447.
(4) Law Rep. 3 A. & E. 289.

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I believe, an appeal to the Privy Council, but it was never prosecuted; and if the cases on this subject ended here, I should have no difficulty in reaffirming the principle laid down by Dr. Lushington, myself, and the Judicial Committee of the Privy Council. But in the case of *The Black Swan* (1), in 1871, where injury and death had been caused by a collision at sea and the suit had been entertained by this Court, an application was made to the Court of Queen's Bench for a prohibition, which was granted: *Smith* v. *Brown*. (2) I need not say that to such a Court it is my inclination, as well as my duty, to pay the highest possible respect; but the unfortunate conflict between the judgment pronounced when the prohibition was granted and the judgment of the Judicial Committee of the Privy Council in the case of *The Beta* (3), compels me to consider the circumstances attending the proceedings before the learned judges of the Court of Queen's Bench and the grounds upon which their decision was founded. The case was heard before Lord Chief Justice Cockburn, Mr. Justice Hannen, and Mr. Justice Blackburn. The latter learned judge said: "I have entertained doubts in this case, not altogether removed, but which are not strong enough to make me dissent from this judgment, or even to make me require further time for consideration." The Lord Chief Justice and Mr. Justice Hannen considered the question "one of considerable difficulty," but decided in favour of the prohibition.

It appears to me that the main ground, I will not say the ratio decidendi of the Lord Chief Justice's judgment was that the word "damage" was used as applicable to mischief done to property, and not to injuries done to the person; and his Lordship said, "And that this distinction is not a matter of mere verbal criticism, but is of a substantial character and necessary to be attended to is apparent from the fact that the legislature in two recent Acts in pari materiâ, both having reference to the liability of shipowners in respect of injury or damage, namely the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, part ix.), and the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63, s. 54), has, in a series of sections, carefully observed this distinctive phraseology,

(1) Not reported. (2) Law Rep. 6 Q. B. 729.
(3) Law Rep. 2 P. C. 447.

speaking in distinct terms, in the same section, of loss of life and personal injury on the one hand, and loss and damage done to ships, goods, or other property on the other. In those Acts the term 'damage' is nowhere used as applicable to injuries done to the person; it is applied only to property and inanimate things. We see no reason to suppose that the legislature, in using the term in the enactment we are considering, had lost sight of the distinction uniformly observed in the preceding statutes." (1)

The Merchant Shipping Act contains no less than 548 sections, and I venture to think that a close inspection of the language of the various clauses will show that this sharp distinction between damage and injury can hardly be maintained, but that, as was admitted by the counsel for the defendants, damages and injury are sometimes interchangeably used. Certainly in the 527th section injury to property is spoken of, and in ss. 505 and 515 the words loss or damage must apply to all the cases mentioned in s. 504, among which are "loss of life and personal injury." It is also to be observed that the Court of Queen's Bench seem to distinguish between the deference due to the Judicial Committee of the Privy Council, as an appellate tribunal, and that due to it on a question of prohibition. (2) It is in the former character that I have to consider it.

It is not improper, perhaps, to remark in this place that the High Court of Admiralty had jurisdiction in the matter of a personal assault committed on the high seas by a master upon a passenger. The action in such a suit was always described as in a cause of damage. The decision of Lord Stowell on this subject will be found in the case of *The Ruckers*. (3)

Lastly, I think it worthy of consideration that the 7th and 13th sections of the Admiralty Court Act, 1861, must be read together, and then the result is that the High Court of Admiralty had jurisdiction over any claim for damage done by any ship, and that whenever any ship or the proceeds were under arrest in that court it had the same jurisdiction that the Court of Chancery had by that section of the Merchant Shipping Act, 1854, to which I have already adverted in the beginning of this judgment.

(1) Law Rep. 6 Q. B. 729, 732. (2) Law Rep. 6 Q. B. 729, 736.
(3) 4 C. Rob. 73.

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Upon the whole, I think it is my duty to adhere to the decision of the Privy Council in the case of *The Beta* (1), and to reject the motion.

The defendants appealed.

May 2. *Benjamin, Q.C., Cohen, Q.C., W. G. F. Phillimore,* and *Stubbs,* for the defendants.

Butt. Q.C., and *E. C. Clarkson,* for the plaintiff.

The arguments and cases cited were the same as in the Court below.

Cur. adv. vult.

June 2. The following judgments were delivered:—

BRAMWELL, L.J. This is the judgment of my Brother Brett and myself. We are of opinion that this appeal should be allowed; that the Admiralty has no jurisdiction in rem in a case in which the right of action is under 9 & 10 Vict. c. 93. We offer no opinion as to whether it would have jurisdiction in a case of personal hurt where there was no death and the person hurt was the plaintiff. We proceed on the ground that an action given by 9 & 10 Vict. c. 93, is not within the words and meaning of the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7.

The legislature, it is true, has given power to the Court of Admiralty to assess and apportion the damages in such cases under certain circumstances under the Merchant Shipping Acts, and in such case it necessarily follows that the machinery of a jury was dispensed with. It is true that a jury can now be had in the Admiralty Division, and, as Mr. Butt pointed out, that the word "damage," in s. 7 of 24 Vict. c. 10, includes damage done to goods. It is also true that under the Judicature Act any action in personam may, as matter of jurisdiction, be brought in the Admiralty Division as well as in any other, yet looking at the terms of Lord Campbell's Act (9 & 10 Vict. c. 93) and of s. 7 of the Admiralty Court Act, 1861 (24 Vict. c. 10), and construing them as if at the time the latter was passed, we are of opinion that s. 7 of the latter Act gives no jurisdiction in rem, which is the question now under discussion. Lord Campbell's Act is

(1) Law Rep. 2 P. C. 447.

express; it says: "The jury may give such damages as they may think proportioned to the injury, and the amount shall be divided in such shares as the jury by their verdict shall find and direct." As to the words "the jury may give," that might possibly be held to mean, jury, where there was a jury, and Court where there was not; I do not say it could be, but whether or no, we are of opinion that under that section it must be a jury who find and direct the division into shares. The words are express. Suppose Lord Campbell's Act had said that such actions should only be brought in a Court where there was a jury, would the 7th section of the Admiralty Court Act, 1861, have repealed that? But it does say so in effect, and the argument is that it is repealed. Suppose that the relations had assigned their right of action, could the assignees have maintained a suit in equity? Would an action lie in the county court without a jury? No; the jury is essential.

It is remarkable that no jurisdiction is given in a case of bodily hurt to a passenger, nor to his goods for injury done in the ship; and we think there is great weight in the argument that the words of the Admiralty Court Act, 1861, s. 7, are not apt words to include a case under Lord Campbell's Act. Such a claim as this is neither popularly or strictly speaking a claim for damages done by a ship. It is a claim for compensation for loss sustained partly by a death caused by a ship, and partly by something else which may or may not happen as well as the death, but which must also happen in order to substantiate a claim for relief. It is a claim not proportioned to the act done, and its immediate consequences, if the act relied on be the act done by the ship, but to the result of that act and other circumstances, namely, the death of the person killed and his not having himself before death sued, and the circumstances of his relations and of their and his property and his disposal of it. Though we have thought it right to make the above remarks, of course we avail ourselves of the judgment and reasons in *Smith* v. *Brown* (1), especially of the difficulty arising from the difference between the Admiralty and common law rule as to contributory negligence. Now the Admiralty rule

(1) Law Rep. 6 Q. B. 729.

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must be given up, or an action given where Lord Campbell's Act gives no action.

We are of opinion that the appeal should be allowed.

BRETT, L.J., read the judgment of BAGGALLAY, L.J., in which JAMES, L.J., concurred.

Ann Jefferey, the plaintiff in the action in which this appeal is brought, is the widow and administratrix of one James Jefferey, who was a mariner on board the steam-ship *Strathclyde*, and was killed in the collision between that vessel and the *Franconia*, in the straits of Dover on the 17th of February, 1876.

The action is brought by Mrs. Jefferey, as administratrix of her deceased husband, to recover damages against the *Franconia* for his death, and for the loss of his goods. The writ was issued on the 12th of February, 1877, and thereupon the owners of the *Franconia* moved to set aside so much of the writ as claimed damages for loss of life. This motion was refused by the Admiralty Division, and from such refusal the present appeal is brought.

Both in the Admiralty Division and upon the hearing of the appeal, the case of the appellants was based upon the contention that the Admiralty Division had no jurisdiction to entertain a claim for damages in respect of loss of life; and the substantial question for decision is whether the Court of Admiralty, previously to the coming into operation of the Judicature Acts had jurisdiction to entertain any such claim; for notwithstanding the general transfer of jurisdiction to the High Court of Justice it is provided by sub-s. 3 of s. 11 of the Judicature Act of 1875, that no person shall assign any cause or matter to the Admiralty Division unless he would have been entitled to commence the same in the Court of Admiralty if that Act had not passed.

It is admitted that if the Court of Admiralty had any such jurisdiction it was conferred upon it by the Admiralty Jurisdiction Act, 1861 (24 Vict. c. 10), s. 7 of which enacts that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The question whether the term "damage," as used in that section is applicable to injury to the person as well as injury to property, has been the subject of frequent discussion and of conflicting decisions; the Court of

Admiralty, in the case of *The Sylph* (1), held that it had jurisdiction to entertain a claim for damages in respect of personal injury, not resulting in death, and the view was adopted by the Judicial Committee of the Privy Council in the case of *The Beta* (2), and in the case of *The Guldfaxe* (3), the Court of Admiralty held that it had a like jurisdiction in respect of loss of life occasioned by a collision.

On the other hand the Court of Queen's Bench in the case of *Smith* v. *Brown* (4), expressly dissented from the decision of the Judicial Committee of the Privy Council in the case of *The Beta* (2), and held that personal injury occasioned by the collision of two ships was not included in the term "damage," as used in s. 7 of the Admiralty Court Act, 1861, and that the Court of Admiralty had no jurisdiction to entertain a claim for damages in respect of personal injury resulting in death; and a general concurrence in this decision of the Court of Queen's Bench has been expressed by the Court of Common Pleas in the case of *Simpson* v. *Blues* (5), and by the Court of Exchequer, and on appeal by the Exchequer Chamber in the case of *James* v. *London and South Western Ry. Co.* (6); but in neither of these cases did the question turn upon the construction of 24 Vict. c. 10, s. 7. I am unable to concur in the construction of the Admiralty Court Act, 1861, which has been so adopted by the Court of Queen's Bench, and apparently concurred in by the other Courts to which I have just referred; it appears to me that the view taken by the Court of Admiralty and by the Judicial Committee of the Privy Council is the more correct.

The words of the 7th section of the Admiralty Court Act, 1861, are perfectly general. Taken by themselves, they would appear to confer a jurisdiction upon the Court of Admiralty to entertain all claims in respect of damage done by a ship, whatever may be the nature of the damage, whether to person or to property; there is nothing in the context of the section to suggest that the word "damage" should be limited in its meaning, and the statute being remedial of a grievance should receive a liberal, rather

(1) Law Rep. 2 A. & E. 24.
(2) Law Rep. 2 P. C. 447.
(3) Law Rep. 2 A. & E. 325.
(4) Law Rep. 6 Q. B. 729.
(5) Law Rep. 7 C. P. 290.
(6) Law Rep. 7 Ex. 187; in error, 287.

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than a narrowed, construction: this principle was acted upon by Dr. Lushington in the case of *The Bahia* (1), and by the Judicial Committee in the case of *Dapueto* v. *Wyllie*. (2) We have only to look at the sections of the Act which follow the 7th section to see that it was the intention of the legislature to give to the Court of Admiralty an extended jurisdiction to enable it to do complete justice in the cases which might come under its consideration. Sect. 13 in particular, confers a jurisdiction under which in many cases, it would be necessary that the Court of Admiralty should assess the amount of damages in respect of loss of life or personal injury, and the nature of the jurisdiction conferred by this section (to which I shall have occasion to refer again presently) appears to me to negative any construction of the Act which would limit the jurisdiction thereby conferred to the same subject-matters as were previously under its cognizance, a view of the case which has been suggested in the course of the argument. It is further to be observed that if s. 7 is to receive the limited construction which has been suggested, it is difficult to understand why it was introduced into the Act, seeing that, in such case the extension of jurisdiction would have been of a very trifling character, as the Court of Admiralty already had undoubted jurisdiction in respect of damage to property occasioned by collision.

It has, however, been urged on the part of the appellants, that, notwithstanding the general terms in which 24 Vict. c. 10, s. 7, is expressed, the word "damage" as used in it, ought, for reasons which will be presently mentioned, to be limited in construction to damage done to property, or at any rate that it ought not to be construed so as to include loss of life.

As similar arguments found favour with the Court of Queen's Bench in the case of *Smith* v. *Brown* (3), and have been adopted by the other Courts to which I have referred, and as two of my colleagues think that our decision in the present appeal ought to be in favour of the appellants, I proceed to express my opinion upon the points so pressed upon us; and I do so with much diffidence, differing as my opinion does from the opinions of those for

(1) Br. & Lush, 61. (2) Law Rep. 5 P. C. 482.
(3) Law Rep. 6 Q. B. 729.

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whose knowledge and experience I entertain the most profound respect, and in differing from whom I cannot but entertain doubt as to the correctness of my own conclusions. In support of the view that the word "damage," as used in s. 7 of the Admiralty Court Act, 1861, should be limited in construction to damage to property, it is contended that, not only is there no legislative sanction for the use of the word as denoting injury to the person, but that the legislature has, in other recent Acts in pari materia, adopted the use of the word "damage" as applicable exclusively to injury to property, and that it must be assumed that the legislature, in passing the Act in question, did not lose sight of the distinction which it had recognized in its other enactments. If the facts were so, I should feel very strongly the force of the arguments based upon them, but I do not so read the Merchant Shipping Act, 1854 and 1862, which are the statutes to which reference has been made; the latter statute it will be observed, was passed after the Admiralty Court Act, 1861.

It is quite true that in the sections of the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104), which have reference to the limitation of the liability of ship owners, the expressions "loss of life" and "personal injury" are used with reference to injury to the person, whilst the word "damage" is used with reference to injury to property; but under the provisions of these sections a different scale of liability was fixed in respect of injuries to the person from that in respect of injury to property, and it was convenient (though I admit not necessary) to use different forms of expression to distinguish the one kind of injury from the other; but if s. 7 of the Admiralty Court Act, 1861, was intended to apply to injury to the person as well as to injury to property, there was neither necessity for using, nor any convenience in using more than one expression to denote both kinds of injury.

But this limited use of the word "damage" is not observed throughout the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104). In s. 515 the words "loss or damage" are used in reference to three classes of injury, and as the word "loss" would be clearly inapplicable to personal injury not resulting in death, the word "damage" must in this section have reference to personal injury as well as to injury to property. Again, if we turn to s. 299

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of the same statute, which is the last of a series of sections enacting various rules for the prevention of accidents, we find that it commences with the words, "In case any damage to person or property arises from the non-observance by any ship of any of the said rules." Here we have a clear and unquestionable use of the "damage" in a sense applicable to injury to person as well as to property. And in s. 527 we find the expression "injury to property," which is suggestive at least of the words damage and injury being to some extent interchangeably used. And so, again, in the other Act referred to, the Merchant Shipping Act of 1862, whilst, on the one hand, we find the expressions "loss of life," "personal injury," and "damage to property," used in the sections modifying the provisions of the Act of 1854 as to the liability of the shipowners, we, on the other hand, find in s. 28 the expression "damage to person or property" applied to injuries occasioned by breaches of the regulations therein referred to. So far, then, from there being no legislative sanction for the use of the word "damage" as denoting injury to the person, and from the legislature having adopted the use of the word as exclusively applicable to property, it appears to me that the very statutes referred to as supporting these propositions, afford intrinsic evidence to the contrary. And here I would refer to a statement made by Sir R. Phillimore, in the course of his judgment in this case in the Admiralty Division, and which appears to be borne out by the report of the case of *The Ruckers* (1), before Lord Stowell, to the effect that an action commenced in the Court of Admiralty in respect of a personal assault committed on the high seas by the master of a ship on a passenger was, previously to the Act of 1861, always described as "a cause of damage." But the further argument remains to be considered, viz., that assuming that it cannot be maintained that such a limited meaning as has been suggested ought to be given to the word "damage" by reason of the legislative use of the word in the Merchant Shipping Acts, the meaning of the word ought nevertheless not to be so extended as to include "loss of life." The argument is based upon the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93), and it is contended that, inasmuch as the right of action created by that

(1) 4 C. Rob. 73.

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Act and extended or modified by the subsequent statute 27 & 28 Vict. c. 95, for obtaining compensation for the families of persons killed by accident, was confined to actions brought in the Courts of Common Law, and that great practical inconvenience and possible injustice might arise from the exercise by the Court of Admiralty of jurisdiction in such matters, it is impossible to suppose that the legislature intended, under a general statute such as that which we are now considering, to effect so great a change in the rights and relative positions of the parties to such actions.

In support of this view it has been urged that the transfer of jurisdiction to the Court of Admiralty would not only deprive the parties of the common law procedure and the mode of trial pointed out by the Act, but might also materially affect their relative rights, having regard to the fact that the Court of Admiralty, in dealing with claims for damage arising from collision, acts upon principles unknown to the common law, as, for instance, dividing the loss where both parties are to blame. It is quite possible that some such inconveniences as those suggested might have arisen from an exercise by the Court of Admiralty of the jurisdiction in question, or may arise from an exercise of the like jurisdiction by the Admiralty Division; though, having regard to sub-s. 9 of the 25th clause of the Judicature Act of 1873, I much doubt whether any such conflict between the civil law and the common law as was suggested by Lord Blackburn in *Smith* v. *Brown* (1) could arise after that Act came into operation; but however this may be, the legislature has thought fit to enact, that under other circumstances of a similar character and at least as likely to occur, similar inconveniences must be submitted to. The right of action given by Lord Campbell's Act has in certain cases been modified and restricted by the sections of the Merchant Shipping Acts already referred to, and the jurisdiction for assessing the amount of damages in such cases as regards injury to the person as well as injury to the property, has been transferred to the Court of Chancery; and, by s. 13 of the Admiralty Jurisdiction Act, 1861, the jurisdiction which, by part 9 of the Merchant Shipping Act, 1854, was conferred upon the Court of Chancery,

(1) Law Rep. 6 Q. B. 729.

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has been extended to the Court of Admiralty whenever the ship, or the proceeds thereof, are under arrest. In this very case, though the ship was not arrested in the action, she had been arrested in other actions, and, as I understand the facts, it was agreed that the case should be treated and dealt with as if she were under arrest and the proceedings were in rem; but however this may be, she might have been under arrest, and if she had been, the Admiralty Division would have been bound, under 24 Vict. c. 10, s. 13, to entertain an action at the instance of the owners of the ship for the distribution of the amount of their liability rateably amongst the claimants, and in such case to assess the amount of damages payable to the plaintiff, and to ascertain the proportions thereof payable to the different members of Jefferey's family.

Every inconvenience and every injustice which has been suggested as likely or possible to occur if the present action had been brought in the Court of Admiralty would or might equally arise in such an action as has been last suggested. It appears to me, therefore, that the argument based upon the probability or possibility of such practical inconvenience or injustice cannot be maintained.

Upon the whole, I am of opinion that the judgment of the Admiralty Division should be affirmed.

The Court being equally divided, the judgment of the Court below stands.

Solicitors for plaintiff: *Gellatley, Son, & Warton.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

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March 21.

Forfeiture—Intent to conceal British Character of British Ship—Sale to bonâ fide Purchaser for Value after Offence Committed, but before Seizure by the Crown—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 103, *sub-s.* 2.

A cause of forfeiture, under the 103rd section of the Merchant Shipping Act, was instituted on behalf of a British officer of customs against a vessel seized for an alleged infringement of the provisions of that section. The plaintiff in his statement of claim in effect alleged that on the 18th of July, 1874, one of her owners, being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as defendant, a statement of defence and counter-claim was delivered on his behalf, which in the 7th paragraph thereof set up the defence, that on the 6th of July, 1876, the defendant became bonâ fide purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. The plaintiff demurred to the 7th paragraph of the statement of defence.

The Court sustained the demurrer, and held that the property in the vessel proceeded against was divested out of its former owners, and vested in the Crown immediately on the commission of any of the offences in respect of which, under the provisions of the section, the penalty of forfeiture was imposed.

THIS was a cause of forfeiture under the provisions of the 103rd section of the Merchant Shipping Act, 1854, instituted on the 10th of July, 1876, against the barque *Annandale*.

On the 28th of July, 1876, an appearance as defendant was entered in the suit on behalf of Hans Lows, described as owner of the *Annandale*. (1)

On the 18th of August the statement of claim was delivered in the action. It was, so far as material, substantially in terms as follows:—

1. The plaintiff was, on and before the 18th of July, 1874, and has ever since been, and still is, a British officer of customs within the intent and meaning of the 103rd section of the Merchant Shipping Act, 1854.

(1) Subsequently on the 28th of November last, the judge in court gave leave to the plaintiff to add William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, as defendants in the action, and on the 2nd of February in this year an appearance was entered for William Hepple, but up to the date of this report no further steps appear to have been taken in the action on behalf of such last-mentioned defendant.

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2. Before and on the 18th of July, 1874, the barque or vessel *Annandale* was, within the true intent and meaning of the said Act, a British vessel, and was registered at the custom-house at Newcastle-on-Tyne as a British ship, in the names of William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison, and William Hepple, as owners thereof.

3. The said W. P. Livingston, W. Pearson, H. J. Livingston, T. Watson, W. Harrison, and W. Hepple, who are respectively natural-born British subjects, were, before and on the said 18th of July, 1874, owners of the said barque.

4. On the 18th of July, 1874, the said W. P. Livingston, acting for and on behalf of himself and his said co-owners, and with their authority, and in order that the register of the said barque might be closed as upon a sale of the said barque to foreigners, represented to the registrar of British ships at the Custom House, Newcastle-upon-Tyne aforesaid, such person being a registrar entitled by British law to inquire into the character of the said barque, that the said barque had been sold to foreigners, and that the said barque was at sea, but that her register (meaning thereby her certificate of registry) would be handed to the said registrar on her arrival.

5. The said registrar, in pursuance and in consequence of such representation as in the last paragraph mentioned, on or about the 28th of July, 1874, closed the said register, and the said barque ceased to be registered as a British ship.

6. The said barque had not, on or before the 18th of July, 1874, been sold to a foreigner or foreigners, and the representation so made as aforesaid by the said W. P. Livingston was false; the said barque, before and on the said 18th of July, 1874, was subsequently, and continued to be, owned by the said owners respectively named, and on such day, and subsequently thereto, she was and continued to be a British ship within the true intent and meaning of the 103rd section of the said Act.

7. On or subsequently to the said 18th of July, 1874, the said W. P. Livingston and his said co-owners hereinbefore named procured, or caused or permitted to be procured and carried on board the said barque a document or foreign certificate of registry known as a lettre de mer provisoire, by which it was stated and represented that the said barque had been bought by one Henry Thomas Watson, of Antwerp, and that she was then a Belgian ship.

8. The said statements and representations in the said document lastly mentioned were untrue, and the said barque, as therein stated, had not been bought by the said H. T. Watson, nor was she then a Belgian ship; but she was then and long after such document was procured or caused to be procured as aforesaid, and continued to be, a British ship within the true intent and meaning of the 103rd section of the said Act, and owned by the said W. P. Livingston and his said co-owners hereinbefore named of one or of more of them.

9. On or about the 19th of September, 1874, the said W. P. Livingston and his co-owners hereinbefore named, although the said barque continued to be and then was a British ship within the true intent and meaning of the Act, procured or caused to be permitted or procured at Newcastle aforesaid a certificate of British tonnage for the said barque as for a foreign vessel belonging to Antwerp in the kingdom of Belgium.

10. On the 6th of July, 1876, one John Stephens, the then master of the said barque, by and with the knowledge and the permission of the said W. P. Livingston and his co-owners hereinbefore named, and of the other persons or

person, if any, then being owners or owner of the said barque, made a report to the plaintiff at Liverpool, or to his deputy and representative respectively, being persons entitled by British law to inquire into the character of the said barque, by which report the said J. Stephens, as such master, stated and represented that the country to which the said barque belonged was Antwerp, meaning thereby Belgium, such statement and representation was untrue. The said barque was and continued to be a British ship within the true intent of the said 103rd section, and owned by the said W. P. Livingston and his co-owners hereinbefore mentioned, or some or one of them, or by one of them, or some of them conjointly with some other person or persons whose names are not known to the plaintiff, was sailed by or with the permission of the said W. P. Livingston and his said co-owners hereinbefore named, and such other person or persons as aforesaid as were then her owners, or by such of them as were then her owners under a foreign flag, to wit, the Belgian flag.

12. The said several matters and things hereinbefore alleged to have been done by the said W. P. Livingston and his co-owners hereinbefore named, or some or one of them, or by one or some of them conjointly with such other persons or person as aforesaid, caused or permitted to be done, or some or one of such matters and things, were respectively matters or things, or a matter or a thing, done or permitted to be done by the owners or owner of the said British barque *Annandale*, with intent to conceal the British character of the said barque from the plaintiff, and from the said registrar at Newcastle-upon-Tyne, and from other the collector and officers of customs at divers British ports, and from the officials of the Board of Trade defined by the said Act, or from one or from some of such persons, all such persons being entitled by British law to inquire into the character of the said barque, or with the intent to assume a foreign character, or with intent to deceive such persons as aforesaid, or some or one of them, and whereby the said barque became and is forfeited to her Majesty.

13. The plaintiff, as a British officer of customs, has seized and detained the said barque as having become subject to forfeiture to her Majesty, and has brought her for adjudication before this court, pursuant to the said section.

The statement of claim claimed a declaration and judgment that the *Annandale* had become and was forfeited to her Majesty; a sale of the vessel by the marshal of the court; and an award to the plaintiff out of the proceeds of the sale, or such portion thereof as the Court might think right.

On behalf of the defendant Hans Lows, a statement of defence and counter-claim (afterwards amended) was delivered on the 4th of November last, the 7th paragraph of such amended statement of defence was substantially in terms as follows:—

7. As to the said several matters in the statement of claim alleged to have been done by the persons and in the ways and with the intents respectively alleged in the statement of claim, the defendant says that on the 6th of July, 1876, he became bonâ fide purchaser of the barque *Annandale* for valuable consideration, and that at the time he became such bonâ fide purchaser he had no

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notice or knowledge whatsoever of the said matters in the statement of claim contained, or any of them, or of the said matters having been done by the said persons in the ways and with the intents in the said statement of claim mentioned, or any of them, or of the said matters having been done at all.

The plaintiff demurred to the 7th paragraph.

March 20, 21. *Sir John Holker, A.G.* (*E. C. Clarkson*, with him), for the Crown, in support of the demurrer. The 103rd section of the Merchant Shipping Act, 1854, provides that if any of the acts there enumerated are done by the owner or master of a British ship "such ship shall be forfeited to her Majesty." The case of *Wilkins* v. *Despard* (1), decided by the Court of Queen's Bench in accordance with the earlier cases of *Robert* v. *Witherhead* (2) and *Hennell* v. *Perry* (3), is a clear authority that the effect of a statutory provision such as this, is that on the commission of any of the offences in respect of which the penalty of forfeiture is imposed, the property in the vessel forfeited under the section is at once divested out of its former owners, so that no subsequent dealings with such vessel can be of any avail against the title acquired by the Crown; in fact, the taint of illegality attaches when any wrongful act against the provisions of the section has been committed, and travels with the property into whosesoever hands it may subsequently come. This principle of law, as settled in this country by *Wilkins* v. *Despard* (1), has, moreover been approved and followed by the Supreme Court in the United States of America in the cases of *The United States* v. *Bags of Coffee* (4); *Gellstein* v. *Hoyt.* (5) [He was here stopped by the Court.]

Murphy, Q.C., and *Milvain*, for the defendant Hans Lows. It is clear, from the recent case of *The Telegrafo* (6), that a ship duly sold to a bonâ fide purchaser before any proceedings have been taken on the part of the Crown against her, cannot afterwards be arrested and condemned on account of offences the subject of forfeiture at common law. This, then, being the state of the law as it existed before the Merchant Shipping Act, 1854, was passed, has the legislature, in the 103rd section of that Act, used language

(1) 5 T. R. 112.
(2) 12 Mod. 92; Salk. 223.
(3) 5 T. R. 117.
(4) 8 Cranch, 398; 3 Curtis, 188.
(5) 3 Wheaton, 311.
(6) Law Rep. 3 P. C. 673.

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unambiguous enough to make such an alteration in the law as is contended for by the plaintiff? It has not. The language of the section clearly points to seizure, if not condemnation, taking place before the forfeiture can accrue. Thus the words "punishable" and "subject to forfeiture" would not have been used in the section if it had been intended that a forfeiture under its provisions should operate immediately on the commission of any of the acts therein prohibited. All the American cases which have been cited in favour of the Crown were decided on the authority of the case of the *United States* v. *Bags of Coffee* (1), and that case ought to be considered in the courts of this country as supporting quite as much the argument on behalf of the defendant as that on behalf of the Crown, for the decision there come to was not an unanimous decision, but that learned judge, Justice Story, dissented from the majority of the Court, and gave an elaborate opinion in favour of the defendant. Moreover in the statute of Congress under which a right of action was given in that case it was expressly declared that certain prohibited articles should be forfeited "whenever" they were imported.

The Court of Queen's Bench, in deciding the case of *Wilkins* v. *Despard* (2), merely followed *Robert* v. *Witherhead* (3), where the repealed statute of 12 Car. 2 c. 18 had to be construed; and not only are the words of the 103rd section of the Merchant Shipping Act, 1854, very different from those of the 1st section of the 12 Car. 2, c. 18, but in the case of *Wilkins* v. *Despard* (2) there had been a seizure of the vessel alleged to be forfeited before the alleged transfer, but no sentence of condemnation. It is not necessary to insist that a sentence of condemnation must be pronounced before the property can be divested, it is enough to contend that the statute requires that the property subject to forfeiture should be seized, and that the title of the Crown only relates back to the time of the seizure. If it had been the intention of the legislature that a forfeiture under the section of the Merchant Shipping Act, 1854, should relate back to the moment when an act against the section was done, similar words would have been used to those to be found in the 10th section of the Bankruptcy

(1) 8 Cranch, 398; 3 Curtis, 188. (2) 5 T. R. 112.
(3) 12 Mod. 92; Salk. 223.

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Act, 1869 (32 & 33 Vict. c. 71), where it is expressly declared that the bankruptcy of a debtor shall be deemed to relate back to the commission of an act of bankruptcy. The Court ought to hesitate before it puts a construction on the section such as would enable the Crown to proceed in respect of a forfeiture under the section to the great inconvenience of commerce, however many transfers for valuable consideration had taken place, and however long a time had elapsed, since the section had been infringed.

Sir John Holker, *A.G.*, in reply, cited *Henderson* v. *Distilled Spirits, &c.* (1) and *Attorney General* v. *Norstedt.* (2)

SIR ROBERT PHILLIMORE. This is a proceeding on behalf of the Crown against the owners of a barque called the *Annandale*, in order to obtain a decree of forfeiture, or a sentence of forfeiture, under the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 103.) The first sub-section of the 103rd section of that Act enacts:—

> If any person uses the British flag, and assumes the British national character on board any ship, owned in whole or in part by any persons not entitled by law to own British ships, for the purpose of making such ship appear to be a British ship, such ship shall be forfeited to her Majesty, ...

And then other provisions follow in the first sub-section, which it is not necessary to mention. The second sub-section proceeds as follows:—

> If the master or owner of any British ship does or permits to be done any matter or thing, or carries, or permits to be carried, any papers or documents, with intent to conceal the British character of such ship from any persons entitled by British law to inquire into the same, or to assume a foreign character, or with intent to deceive any such person lastly hereinbefore mentioned, such ship shall be forfeited to her Majesty; . . .

Now it must be taken to be admitted in this case that on the 18th of July, 1874, the barque *Annandale* was fraudulently represented by one of her owners at the custom-house at Newcastle-on-Tyne to have been sold to foreigners, and therefore she falls under the edge of that provision of the Merchant Shipping Act, 1854, which I have just read. The defendant, Hans Lows, sets up, amid other grounds, the following in the 7th paragraph of the amended statement of defence and counter-claim. [His Lordship

(1) 14 Wallace, 44. (2) 3 Price, 97.

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here read the paragraph in question.] Then the amended statement of defence and counter-claim goes on to state that the barque *Annandale* was seized by the plaintiff on the 9th of July, 1876, and from that date is still detained.

The demurrer is taken to the validity of the 7th paragraph of the amended statement of defence and counter-claim. It is contended on behalf of the Crown that the property in this case was divested at the time when the owners committed the fraudulent act to which I have adverted. On the other hand, it has been contended on behalf of the defendant, Hans Lows, that the property was not divested until the seizure. It is admitted, as I understood, that it is not necessary to have had a sentence of condemnation, but it is contended that seizure was necessary in order to divest the owners of the property. Now the Court has been referred to various cases in the courts of this country and in the courts of the United States of America, and it is not, in my judgment, necessary to do more than state the substance of the decisions which have been come to in the courts of this country. The case principally and properly relied upon is the case of *Wilkins* v. *Despard* (1), which seems to have followed two former decisions referred to in it—*Robert* v. *Witherhead* (2) and *Hennell* v. *Perry* (3); and the principle laid down in those cases, and adopted in *Wilkins* v. *Despard* (1) is, that the forfeiture accrued before seizure, and before the institution of any suit, at the time when the illegal and fraudulent act was done, and that it divested out of the owners the property which before they had in the ship, and that the seizure related back to the act which was the cause of the forfeiture.

I am of opinion that this position is a sound one in law, looking to the cases to which I have adverted, and that the demurrer must be sustained on the ground that the forfeiture accrued at the time when the illegal act was done, and that the seizure of the *Annandale* related back to the time of the wrongful act committed by the then owners. It will be therefore for the defendant to consider whether he will amend his plea.

Solicitor for plaintiff: *Toller.*
Solicitors for defendant: *Oliver & Botterell.*

(1) 5 T. R. 112. (2) 12 Mod. 92; Salk. 223. (3) 5 T. R. 117.

1877
July 13.

[IN THE COURT OF APPEAL.]

THE AMSTEL. (1877 O. 113.)
OWNERS OF THE AGHIOS SPIRIDION *v.* OWNERS OF THE AMSTEL.

Practice—Leave to Appeal from Judgment of County Court in Admiralty—31 & 32 Vict. c. 71, s. 27.

9PD13

An appeal will not lie from a refusal by the judge of the Admiralty Division to allow, under 31 & 32 Vict. c. 71, s. 27, an appeal from a county court judgment to be prosecuted.

THIS was a motion by the owners of the *Amstel* for leave to appeal from a decision of the judge of the Admiralty Division, refusing leave to appeal from a judgment of the Cardiff county court, pronounced on the 14th day of April, 1877, but directed by the judge to be entered as of the 20th of March.

The *Amstel*, while being towed by the *Flying Fish*, came into collision with the *Aghios Spiridion*, and damaged her. The owners of the last-mentioned ship brought an action for damages in the Admiralty Division against the owners of the *Amstel*. The defendants served a notice under Order XVI., Rule 18, claiming indemnity or contribution from the owners of the *Flying Fish*. The judge of the county court of Cardiff held, that they were not entitled to such relief, and pronounced judgment accordingly. The defendants moved before the judge of the Admiralty Division for leave to appeal from this judgment, leave being necessary, as an appeal could not be lodged within ten days from the date of the order, and on the 29th of May, the motion was refused with costs. The owners of the *Amstel* appealed from this refusal.

Gainsford Bruce, for the appeal, referred to 31 & 32 Vict. c. 71, ss. 26 to 29, and contended that these provisions must be overridden by the Judicature Act, s. 19, under which every order, except as therein mentioned, was subject to appeal.

Milward, Q.C., contrà, was not called upon.

JAMES, L.J. The statute 31 & 32 Vict. c. 71, s. 27, enacts that an appeal from a county court in an Admiralty cause shall not be allowed unless an appeal is lodged within a certain time;

but provides that the judge of the Admiralty Division may allow it to proceed on sufficient cause being shewn to his satisfaction for the omission. Cause has not been shewn to his satisfaction, and I am of opinion that we have no jurisdiction to interfere.

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BAGGALLAY, and COTTON, L.JJ., concurred.

Solicitors: *Pritchard & Sons, W. W. Wynne.*

[IN THE COURT OF APPEAL.]

July 23.

THE CITY OF BERLIN. (1877 N. 287.)

THE NATIONAL STEAMSHIP COMPANY *v.* THE OWNERS OF THE CITY OF BERLIN.

Costs of Appeal—Salvage.

Though in appeals as to the amount of salvage the Judicial Committee of the Privy Council generally did not give a successful appellant his costs of the appeal, such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs.

THIS was an appeal by the plaintiffs from a judgment of Sir R. Phillimore, awarding them 2000*l.* for salvage service to the *City of Berlin*.

The *City of Berlin* was a large steamer bound on a voyage from New York to Liverpool. Her value, including cargo and freight was upwards of 220,000*l.* She had on board a crew of 132, and 474 passengers. On the 8th of June, 1877, her screw shaft broke, and the wind being so light that she could not be steered, she drifted until the 10th of June, when she was taken in tow by the steamship *Spain*, also bound for Liverpool, in latitude 49° 23′ N. and longitude 23° 20′ W., about 594 miles from Queenstown, and was safely brought to Queenstown on the 13th. The weather was fine and the wind light during the whole time, and there was no evidence of any special danger. The *Spain* and her cargo were of the value of 154,634*l.*, and she had on board a crew of 110 hands, and 240 passengers. Each vessel had on board a large amount of cargo of a perishable character. The owners of the *Berlin* tendered 1200*l.* as salvage. The judge heard the case

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with the assistance of the Elder Brethren of the Trinity House, and awarded 2000*l.* The plaintiffs appealed to increase the amount, and the appeal was heard before the Court of Appeal with two nautical assessors.

Aspinall, Q.C., for the appellants.
Milward, Q.C., for the respondents.

THE COURT OF APPEAL (James, Baggallay, and Cotton, L.JJ.) awarded 4000*l.*, with the costs of the appeal.

Milward, Q.C., submitted that the appellants ought not to have the costs of the appeal, inasmuch as when these cases were heard before the Judicial Committee of the Privy Council, which was in the habit of giving successful appellants their costs of an appeal when it was not done in other courts, an appellant never obtained the costs of a successful appeal as to the amount of salvage: *The Inca* (1); *The Chetah* (2); *The Amerique.* (3)

JAMES, L.J. I see no reason why salvage cases should form any exception to the general rule adopted under the Judicature Act, that a successful appellant is entitled to his costs of the appeal.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors: *Toller & Sons; Gregory, Rowcliffe, & Co.*

(1) 12 Moo. P. C. 189. (2) Law Rep. 2 P. C. 205.
(3) Law Rep. 6 P. C. 468.

THE ANEROID. (J. 434.)

1877
April 17.

Necessaries—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 4—*Sale of Vessel to Purchaser with notice of claim for Necessaries previously supplied.*

The statement of claim in an action of necessaries in rem alleged that in November, 1874, the plaintiff had supplied to the owners of the vessel proceeded against certain stores necessary for her equipment; that in September, 1876, whilst the amount due in respect of the said stores was still unpaid, forty-three sixty-fourth shares in the vessel had been transferred to the defendant in the action with knowledge and notice of the plaintiff's claim; that the plaintiff became owner of the shares subject to such claim; and that the value of the shares was increased by reason of the said equipment, and the owners of the vessel had derived benefit therefrom:—

Held, on demurrer, that the statement of claim shewed no right of action in respect of the vessel as against the defendant.

THIS was an action of necessaries, instituted on behalf of Daniel Jones against the brigantine *Aneroid*, belonging to the port of Swansea.

The statement of claim in the first three paragraphs alleged that the writ in the action was issued whilst the *Aneroid* was under the arrest of the Court; that the plaintiff was employed in October, November and December, 1874, by T. P. Richards and S. B. Power, or one of them, the then owners or owner of the *Aneroid*, to supply certain stores and materials necessary for the equipment of the *Aneroid;* and that the plaintiff in respect of such stores and materials became entitled to be paid 221*l.* 16*s.* 2*d.*

The fourth and sixth paragraphs of the statement of claim contained substantially the following allegations:—

4. On the 21st of September, 1876, the said T. P. Richards and S. B. Power transferred forty-three of sixty-four sixty-fourth shares in the said brigantine to Abraham Hopkins who has appeared as a defendant in this action. The said Abraham Hopkins on the same day mortgaged the said forty-three sixty-fourth shares to the said T. P. Richards and S. B. Power. At the time of the last-mentioned transfer, and at the time of the mortgage, the said sum of 221*l.* 16*s.* 2*d.* was still due and unpaid to the plaintiff, and A. Hopkins had thereby knowledge and notice of the same, and that the plaintiff claimed to be paid the same, and A. Hopkins became owner of the forty-three sixty-fourth shares, subject to the claim of the plaintiff.

6. The said sum of 221*l.* 16*s.* 2*d.* is still due to the plaintiff, and the plaintiff cannot obtain payment thereof without the assistance of this Court. The value

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of the brigantine was increased by reason of the said equipment, and the persons who now are the owners of the brigantine have derived benefit and advantage therefrom.

The defendant demurred to the fourth and sixth paragraphs of the statement of claim, on the ground that it shewed no right of action against the *Aneroid* in the hands of her present owners.

April 10. *J. P. Aspinall*, for the defendant in support of the demurrer, cited and relied upon *The Two Ellens* (1), and *The Pieve Superiore* (2), as shewing conclusively that the plaintiff had acquired neither a maritime nor an equitable lien. [He also referred to 24 Vict. c. 10, s. 4.]

G. Bruce, for the plaintiff. The defendant became interested in the *Aneroid* with notice that the plaintiff had supplied necessaries for her equipment, and that the necessaries had not been paid for. The value of the vessel was increased by reason of the necessaries supplied to her, and the defendant acquired a benefit, with notice that a burthen was attached to the benefit. Qui sentit commodum, sentire debet et onus. *Hooper* v. *Gumm* (3); *Bristow* v. *Whitmore* (4); *Le Neve* v. *Le Neve* (5). This being so the plaintiff has a perfectly good cause of action, notwithstanding the 4th section of the Admiralty Court Act, 1861, does not confer a maritime lien. Not only did no question of notice arise in the case of *The Two Ellens* (1), and the subsequent case of *The Pieve Superiore* (2), but the Judicial Committee of the Privy Council in the latter case, and Dr. Lushington in *The Alexander Larsen* (6), seem expressly to have refused to decide what the position of the material man would be where a shipowner had purchased a ship with notice of a claim for necessaries supplied for her use.

Aspinall, in reply.

Cur. adv. vult.

SIR ROBERT PHILLIMORE. This is a demurrer to the statement of claim. The statement of claim alleges that the plaintiff

(1) Law Rep. 4 P. C. 161.
(2) Law Rep. 5 P. C. 482.
(3) Law Rep. 2 Ch. 282.
(4) 31 L. J. (Ch.) 467.
(5) 2 White & Tudor, Leading Cases in Equity, p. 28, ed. 1866.
(6) 1 Wm. Rob. 288.

supplied certain stores and materials to the brigantine *Aneroid* as part of her equipment. That Richards and Power were then the owners, but that they transferred forty-three sixty-fourth shares to Abraham Hopkins the defendant; the other shares being otherwise disposed of, and that at the time of the transfer the vendee had notice that the plaintiff's account was still unpaid.

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The statement of claim also alleges that the vessel was under arrest in some other action when this action was brought.

The writ is in rem indorsed for 221*l.* 16*s.* 2*d.*, and the claim is for the condemnation of the defendant and his bail in such amount as the Court may direct, with costs. The question is whether a person supplying materials for the equipment of a ship is entitled to payment out of the res, when that res has been sold to a purchaser who has knowledge that the tradesman's claim is unpaid, but who purchases before any arrest of the ship?

If the question be answered in the affirmative it must be upon the ground that a tradesman has a lien which travels with the res after it has become the property of other owners.

Now it was admitted that the case of *The Two Ellens* (1) was a decisive authority as to there being no maritime lien. There is no question of an ordinary possessory lien. It has, however, been contended that there is in cases like the present an equitable lien, and certain cases were cited in support of this position. In my judgment this position cannot be supported.

It would be difficult to see what principle of equity could render the purchaser, who it must be presumed had paid the full value of the repaired ship, liable for the debt of the vendee to the repairing tradesman, with whom the vendee had no contract at all. I do not think that the fact of notice being given can create a lien which is neither a maritime lien nor a possessory lien; I must therefore pronounce for the demurrer with costs.

Solicitors for plaintiff: *Nelson, Son, & Hastings.*
Solicitor for defendant: *Coote.*

(1) Law Rep. 4 P. C. 161.

1877
Feb. 27.

[IN THE COURT OF ARCHES.]

WILLIS *v.* THE BISHOP OF OXFORD.

Duplex Querela—Practice—Refusal of Bishop to Institute on the ground of Insufficiency in Learning—Responsive Plea—Standard of Learning—Costs.

In the affidavit to lead the monition in a suit of duplex querela it was alleged that the promovent had been refused institution to a benefice by the bishop of the diocese on the ground of insufficiency of learning.

On application on behalf of the bishop the Court ordered that the suit should be tried not by act on petition and answer but by plea and proof, and that the promovent should bring in his libel.

The libel of the promovent having been subsequently brought in, a responsive plea was filed on behalf of the bishop, alleging in effect that the promovent on applying to be instituted had been examined by direction of the bishop, and that the result of the examination had conscientiously satisfied the bishop that the promovent was non idoneus and minus sufficiens in literaturâ. Thereupon the promovent applied to the Court to reject the responsive plea.

The Court directed that the responsive plea should be amended, and that there should be on the face of the amended responsive plea such a statement of the grounds on which institution was refused as would enable the Court, assuming the facts to be true, to decide upon the validity of the objection taken to the promovent, and would enable the promovent to take issue on the truth of such facts.

Where in a suit of duplex querela the bishop justifies his refusal to institute on the ground that the promovent is minus sufficiens in literaturâ, it is for the Court to determine whether the standard up to which the bishop considers the ability of the promovent ought to come is such a standard as is required by law.

THIS was a suit of duplex querela arising out of the refusal of the Right Rev. the Bishop of Oxford to institute the promovent the Rev. Richard Child Willis, D.D., of Minster, Sheppey, in the county of Kent, to the rectory of Drayton-Parslow, in the diocese of Oxford.

The affidavit to lead the monition was filed on the 12th of June, 1876, and in substance alleged that the bishop had refused to institute the promovent to the rectory of Drayton-Parslow on the ground of insufficiency of learning. Thereupon, and on an ex parte motion in court by counsel on behalf of the promovent, the monition with intimation issued (1), and service thereof having

(1) The monition was under the seal of the court, and was signed by the registrar and by the counsel for the promovent. It was mutatis mutandis,

been accepted, and an appearance entered, on behalf of the Bishop of Oxford, his proctors on the 4th of July prayed to be heard on their act on petition.

July 13, 1876. *Dr. Tristram*, on behalf of the promovent, moved the Dean of Arches, the Right Honourable Lord Penzance, to order the cause to be tried by plea and oral evidence, and to give leave to the promovent to bring in his libel. [He referred to *Gorham* v. *Bishop of Exeter*. (1)]

Dr. Swabey, on behalf of the Bishop of Oxford, submitted that in suits of duplex querela the practice, so far as it could be ascertained, had been not to proceed by plea and proof, but by act on petition and answer.

LORD PENZANCE. Suits of this character are not often before the Court, and, indeed, when proceedings in duplex querela were taken by Mr. Gorham in the case of *Gorham* v. *Bishop of Exeter* (1) there was great difficulty, that being the first case known in which the remedy was resorted to in recent times, in finding a precedent in accordance with which the suit could be conducted; it is therefore not unimportant to secure that the pleadings in the present and other suits of duplex querela should be such as will give the parties a proper opportunity of shewing in a proper field what are the points at issue between them. I cannot shut out the fact that in *Gorham* v. *Bishop of Exeter* (1) the Judicial Committee of the Privy Council took exception to the mode of pleading by act or petition and answer which had been the mode adopted in that case. I have been referred to the following passages in their Lordships' judgment in that case:—

> After litigation had thus commenced, and Mr. Gorham had called upon the bishop to state why institution was refused, it became evident that the reasons must be considered upon legal principles, and it was perhaps reasonably to be expected that both parties would require a strict and formal proceeding in which what was the particular unsound doctrine imputed to Mr. Gorham would have been distinctly alleged which constituted his alleged offence.
>
> Unfortunately, this course was not adopted. The bishop proceeded by act on

the same as that set out in *Walsh* v. *Bishop of Lincoln* (Law Rep. 4 A. & E. 242), with the exception that twenty-four days instead of sixteen days were given to the bishop to enter an appearance.

(1) Moore's Special Report, pp. 459, 460.

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petition. . . . . In part supply of proof of the premises the bishop referred to a book written and caused to be printed and published by Mr. Gorham, containing, amongst other things, the several questions put by the bishop to Mr. Gorham in the course of the examination, and Mr. Gorham's several answers to the same questions.

Mr. Gorham made no objection to the mode of proceeding by act on petition, but put in his answer thereto. . . . . The bishop replied to Mr. Gorham's answers generally. The book published by Mr. Gorham was the only evidence adduced on either side, and with such allegations as are contained in the bishop's act on petition and Mr. Gorham's answer, the case was brought on to be heard, with no statement on the part of the bishop of what was in his lordship's view the true doctrine of the Church of England in respect of the efficacy of the baptism either of adults or infants, nor any specification of the doctrine imputed to Mr. Gorham, except the general charge before stated; and no distinct statement on the part of Mr. Gorham of what in his view is the true doctrine of the Church of England,—what is the particular doctrine which he himself maintains on the subject in question,—or in what particulars, or for what particular expressions, he requires the just and favourable construction which he considers to be necessary and sufficient to secure the entire agreement between the articles and the liturgy and his doctrine. As this form of pleading was acquiesced in on both sides, neither party has any reason to complain of the other, but those who are called upon to judge of the matters in difference have great reason to complain that instead of their attention being directed, as it ought to have been, to specific propositions distinctly stated, and to the evidence directly applicable to those propositions, instead of having a specific and precise statement of that which the bishop alleged to be the doctrine of the Church of England upon the matters in question and upon which he meant to rely, and of the specific doctrine held by or imputed to Mr. Gorham and alleged to be unsound—the case is brought forward and left in such a form that, without being supplied with any allegations distinctly stated, or any issue distinctly joined, we are required minutely and accurately to examine a long series of questions and answers—questions upon a subject of a very abstruse nature; intricate, perplexing, entangling, and many of them not admitting of distinct and explicit answers; and answers, not given plainly and directly, but in a guarded and cautious manner, with the apparent view of escaping from some apprehended consequence of plain and direct answers.

Now all these troubles come again.

The inconvenience of this course of proceeding is so great, and the difficulty of coming to a right conclusion is thereby so unnecessarily increased that, in our opinion, the judge below would have been well justified in refusing to pronounce any opinion upon the case as appearing upon such pleadings; and in requiring the parties, even at the last moment, to bring forth the case in a regular manner by plea and proof.

Now I think it is incumbent on the Court, so far as possible, to prevent any inconvenience such as the Judicial Committee of the Privy Council so objected to again arising, and, this being so, I think that the application now before the Court is a reasonable

application, and that the pleadings should take the form, not of an act on petition and answer, but of a libel and a responsive plea to which, if necessary, exceptions may be taken, and in this manner I think the matters at issue will be arrived at.

On the 11th of August, 1876, the libel of the promovent was brought in. It alleged in the 1st paragraph thereof that the promovent the Rev. Child Willis graduated as bachelor of arts at University College, Oxford, in 1822, was ordained deacon in 1823, and priest in 1824, subsequently proceeded to the degree of master of arts and bachelor in divinity in the said university, and in 1841, being desirous of proceeding to the degree of doctor in divinity, presented himself to the then regius professor of divinity in the said university for examination for such degree, and having composed a sermon in Latin to the satisfaction of the said professor, had such degree conferred upon him; that the said promovent had for the last twenty years been vicar of the parish of Minster, and the adjoining parish of Warden, in the Isle of Sheppey, and for the last six years had had the sole charge of both such parishes, and during such time had there performed two services with two sermons at least every Sunday to the satisfaction of his parishioners, who, it was alleged, were well satisfied as to the zeal and ability with which he had discharged his ministerial duties and as to his sufficiency as a preacher. The libel then proceeded in substance as follows:—

The rectory of Drayton-Parslow, in the county of Buckingham, and diocese of Oxford, having in the month of December, 1875, become vacant by the death of the Rev. Benjamin Spurrell, the late rector thereof, the said promovent was recommended to Mrs. Sarah Spurrell, the true and undoubted patroness of the said rectory, by Mr. John Newton, of Leighton Buzzard, Bedfordshire, of which parish the promovent had had the sole charge for three months. That the said promovent, after having had an interview with the said Sarah Spurrell, who had previously received letters commendatory of him from the churchwardens of his said parish and from a resident parishioner of the same as to his sufficient qualifications for ministerial duty, was offered the presentation of the said living by the said Sarah Spurrell, which he accepted. That the said promovent in the month of March, 1876, forwarded to the said Lord Bishop of Oxford his presentation to the said rectory duly signed by the said Sarah Spurrell, together with a testimonial of his good life and behaviour, drawn up in the customary form, signed by three beneficed clergymen in the Island of Sheppey, and countersigned by his Grace the Lord Archbishop of Canterbury, and at the same time applied to the said Lord Bishop of Oxford to be instituted into and invested in and

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admitted to the said rectory and parish church. That although the promovent has offered himself as ready and willing to make the subscriptions and declarations, and to take all necessary oaths by law required in that behalf, and still is capable and duly qualified by his private character, age, and learning, to be instituted and invested in and admitted to the said rectory, yet that the said Lord Bishop of Oxford hath, without just cause and contrary to law, delayed and refused to institute him into the said rectory and to do justice in that behalf.

The libel concluded with a prayer that the judge would be pleased to proceed to institute and invest the promovent into the said rectory of Drayton-Parslow aforesaid, and cause him to be inducted into the same, and to grant such further relief in the premises as to his lordship might seem meet.

The admission of the libel was not opposed, and a negative issue having been given thereto, the proctors for the Bishop of Oxford on the 21st of October filed a responsive plea, which alleged inter alia substantially as follows:—

1. The defendant admits that he has refused to institute the promovent into the rectory of Drayton-Parslow, in the county of Buckingham and diocese of Oxford, and justifies his refusal for the reasons and under the circumstances hereinafter set forth.

2. Save as aforesaid, the defendant does not admit the statements contained in the libel of the promovent.

3. The promovent having duly applied to the defendant for institution to the said rectory, the defendant as he was of right entitled and in duty bound to do as well by the statutes as by the constitutions and canons of the Church, in order to ascertain whether the promovent was worthy of the office and ministry caused him to be examined as hereinafter stated.

4. On the 26th of May, 1876, the promovent was by the direction of the defendant examined by the Venerable Archdeacon Pott, one of the defendant's chaplains.

5. The result of the said examination satisfied the defendant that the promovent was "non idoneus et minus sufficiens in literaturâ."

6. The promovent was offered an opportunity of presenting himself for further examination, but has never availed himself of such offer.

7. The defendant being convinced from the examination of the promovent as aforesaid, and also from his neglect to submit to a further examination as aforesaid, that the promovent was and is not a fit person to be instituted to the said rectory, conscientiously and according to his duty as Bishop of Oxford, and for no other motive or reason whatever decided and determined that he could not institute the promovent to the said rectory, and of such decision has given the promovent due notice.

8. Such decision was formed by the defendant, and is still adhered to by him upon a full and deliberate consideration of all the circumstances connected with the said examination, and with the neglect of the promovent to offer himself for further examination, and in forming this decision and through the whole of this

transaction the defendant has acted according to the best of his judgment, and from a conviction that the duty imposed upon him by his office requires that he shall not institute to a cure of souls any one whom he does not in his conscience believe to be a fit person nor sufficiently learned for the office. (1)

Nov. 3, 1876. *Dr. Tristram*, on behalf of the promovent, moved the Dean of Arches in court to reject the responsive plea, on the ground that the 5th article thereof did not specify in what particulars the promovent had proved himself non idoneus et minus sufficiens in literaturâ. The responsive plea raises a false issue. The real issue to be tried is whether the promovent was or was not "minus sufficiens in literaturâ," and not whether the result of the examination proved that he was "minus sufficiens." It appears clear from the books that in suits of duplex querela, as in actions of quare impedit, it is the province of the Court, and not that of the bishop, to determine what is the standard of doctrine or learning which the law requires, and then to decide whether the clerk has failed to come up to that standard. In order to enable the Court to adjudicate on these questions, the defendant must state in a precise and distinct manner in what particulars the promovent proved to be insufficient in learning. [He referred to *Specot's Case* (2); *Bishop of Exeter* v. *Marshall* (3); *Bishop of Exeter* v. *Hele* (4); Ayliffe's Parergon, 233; Grey's Ecclesiastical Law, 275; Gibson's Codex, 784, n.; Second Institute, 631.]

Dr. Swabey, on behalf of the Bishop of Oxford, opposed the motion. The responsive plea ought to be admitted to proof. It alleges that in the bonâ fide opinion of the bishop, formed after a consideration of the result of the examination, the promovent was minus sufficiens in literaturâ. This raises the only issue which the Court has jurisdiction to try. The Court has no jurisdiction to go into the question whether the conclusion arrived at by the bishop, assuming it to be formed bonâ fide, was erroneous or based on an erroneous standard: *Povah's Case*. (5) The standard of learning required in different dioceses must necessarily vary, and

(1) The prayer of the responsive plea was that the defendant should be dismissed from all further observance of justice; that the promovent be condemned in costs; and the defendant's refusal to institute the promovent be confirmed.

(2) 5 Co. Rep. 57.

(3) Law Rep. 3 H. L. 17, 52.

(4) Show. P. C. 114, ed. 1876.

(5) *Rex* v. *Archbishop of Canterbury*, 15 East, 117.

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the bishop can obviously, with much greater convenience than this Court, determine what qualifications are required in each case.

Dr. Tristram, in reply.

Cur. adv. vult.

Dec. 2, 1876. LORD PENZANCE. The question at present before the Court in this case is whether the responsive plea of the bishop should be admitted. The promoter in this proceeding of "duplex querela" complains in his libel that having been duly presented to the rectory of Drayton-Parslow, within the diocese of Oxford, and having applied to the bishop to be instituted thereto, the bishop has refused to institute him. The answer of the bishop put forward in his responsive plea is this: That he deputed the Venerable Archdeacon Pott, one of his chaplains, to examine the promoter "in order to ascertain whether he was worthy of the office and ministry," and that "the result of the said examination satisfied him (the defendant) that the promoter was non idoneus et minus sufficiens in literaturâ."

It is objected against this as an answer, that the bishop is bound to go much further, and state distinctly in what respect the clerk is "non idoneus," and in what respect he fell short of that standard in education or acquirements which is described as "sufficiens in literaturâ."

On the part of the bishop it is broadly claimed that his judgment on these subjects is by law final, and not subject to review by this Court. If this proposition were admitted there would be little objection, I think, to the responsive plea, except perhaps that which would arise from the bishop having delegated his functions to another.

But this claim is denied, and the controversy on the present application will be found, I think, to resolve itself substantially into the question whether such a claim can be sustained or not. It is not contested by the learned counsel on the part of the bishop that if this question of the clerk's sufficiency arose in a suit of quare impedit between the bishop and the patron of the living, the bishop would be bound to state the particulars of insufficiency upon which he relied, and the Court would be entitled to review the decision at which he had arrived. But

it is contended that if the same question arises in a suit like the present between the bishop and the clerk, the rights of the parties are wholly different, and the bishop's judgment in no way subject to review, so that if, in any instance of refusal to institute, two suits were simultaneously commenced, one by the patron and the other by the clerk, both complaining of the same act of the bishop, that act might be successfully impugned in the former, but could not be so much as questioned in the latter.

Such a view of the law is so little reasonable or satisfactory that it needs to be well supported by authority.

But the learned counsel for the bishop was unable to produce any authority for such a distinction, and the only argument by which he endeavoured to uphold it was based upon a supposed difference between insufficiency "in literaturâ" and unsoundness in doctrine as grounds for the bishop's refusal.

I will now turn to such authorities as there are in these matters.

On the question of the patron's rights in quare impedit, the case of the *Bishop of Exeter* v. *Marshall* (1), in the House of Lords, is a conclusive authority. In that case Mr. Justice Blackburn said:—

> But in the plea in quare impedit it is not enough for the bishop to say that he thought, or even found, that the clerk presented was not a fit person; he must state positively that he was not a fit person, and must state in what respect he was not fit, with so much certainty and particularity as will enable the Court to judge whether the objection is one which, if true in fact, renders him unfit, and will enable the patron to take issue upon it if he disputes the truth of the objection (at p. 33).

Baron Martin added:—

> . . . The plea ought expressly to aver the reason of the unfitness of the clerk, so that your lordships could judge of its sufficiency upon demurrer, and the patron could deny its truth, and that, too, whether the reason might be spiritual or temporal (at p. 44).

And, in moving the judgment of the House, Lord Westbury, adopting the opinion of the learned judges, said:—

> The rule contended for by the Bishop of Exeter would certainly open the door to very arbitrary and capricious proceedings, rendering the title of the clerk and the right of the patron entirely dependent on the will of the prior bishop. Such

(1) Law Rep. 3 H. L. 17.

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a conclusion is at variance with reason, and therefore repugnant to what is called "the policy of the law" (at p. 54).

It seems to me that much of the reasoning upon which that case was decided applies to this suit in the Ecclesiastical Court on behalf of the clerk, although, of course, the decision itself, relating as it did to a suit of quare impedit, is not a direct authority. But the matter does not rest here, for such authority as is to be found in the books regarding this antiquated suit of "duplex querela" all tends in the same direction.

In Ayliffe's Parergon, after describing a duplex querela, the author goes on thus:—

As to the form of this rescript, and the proceedings on it, it is as follows, viz., It ought to contain a monition, that within five or nine days the bishop should admit the party complaining, and also a citation for him to appear either by himself or his proctor at another day, in case he should refuse so to do; and then to shew cause of his refusal.

And again:—

If the bishop appears and alledges a cause of his refusal to admit the person, as that . . . the person is a Simoniac, unlearned, and the like, then they are to proceed to trial, and if the bishop fails in his proof, the judge then pronounces sentence for his own jurisdiction and condemns the bishop in expenses of suit. (At p. 233.)

To these passages the author adds the following:—

NOTE.—This way of proceeding against the bishop is very proper, where the refusal is for incapacity or any other personal defect in the clerk; because these are causes which the spiritual judge may try.

"If the bishop fail in his proof," "proceed to trial," and "causes which the spiritual judge may try," are words which surely point to a power in this Court to hear and try the question of sufficiency, and are hardly consistent with the bishop's decision being final and conclusive. So, again, in Gibson's Codex, I find the following:—

Double Quarrel.—This is, when a clerk who is presented to a benefice, offers himself to the bishop, or other person having power, for institution, and is refused or unreasonably and illegally delayed: In which case he may appeal to the immediate superior (to the archbishop, when the ordinary refuses; or to the Court of Delegates where the archbishop refuses), and thereupon obtain an instrument directed to the ordinary, and called duplex querela; containing a monition to institute within a certain day; or if he refuse, then to appear, and shew cause why he doth not. . . . But if the bishop appears by himself or proxy, and alledges matter of spiritual cognisance, as that the church is full or the clerk immoral or insufficient; then the superior Court proceeds to trial, and, as the matter appears, gives judgment for or against the institution. (At p. 781.)

Here, it is to be observed, the application to this Court is called an appeal. The bishop is said to "shew cause," and then the Court is to "proceed to trial, and, as the matter appears, give judgment." Nothing, it appears to me will satisfy the meaning of such expressions short of reviewing the bishop's decision, and of trying the question of the clerk's sufficiency on its merits. There is also the passage in "The 2nd Institute" cited in argument, but it adds nothing material to the above authorities.

Finally, there is the case of *Gorham* v. *Bishop of Exeter* (1), which is, so far as I know, the only reported case of the final hearing of a suit of this character. It was a duplex querela like the present. The proceedings took the form of an act on petition, and an answer instead of a libel, and a responsive plea as here. But in that suit, as in this, the question was whether the respondent was justified in refusing institution.

The bishop does not appear to have there claimed the exercise of any authority which could not be reviewed or any right to form, and act upon, his own judgment without appeal. On the contrary he set forth the grounds of his refusal, which consisted in an alleged unsoundness of doctrine in Mr. Gorham, and submitted them to this Court, whose decision was recorded in his favour, but on appeal the judgment of this Court was reversed, and the bishop's ground of refusal to institute held insufficient.

This is strong authority in favour of the jurisdiction of this Court to review the bishop's decision, and although the alleged defect in the clerk in that case was one of doctrine, while in this case it is one of learning, the principles involved are equally applicable to both. I hold, therefore, that the bishop is bound to state on his plea affirmatively as a fact that the clerk was not at the time he applied for institution "idoneus," and was not "sufficiens in literaturâ,"—if those be the grounds of his refusal; and further in what respect he was not so, and I think he should do this with the particularity stated to be requisite by Mr. Justice Blackburn in the passage above quoted. There ought to be on the face of the plea such a statement of the grounds of refusal as will enable the Court, assuming the facts to be true, to decide upon the validity of the objection taken to the clerk, and on the other hand such as will enable the clerk to take issue on their

(1) Moore's Special Report, see p. 122.

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truth. To explain what I mean, I will suppose, as suggested at the bar, that the real objection in this case to the clerk was based upon his inability to translate Greek into English and English into Greek. If that be so I think the bishop must affirm in his plea that the ability to do so is a necessary qualification, and that it is essential to constitute sufficiency "in literaturâ." And so with respect to the Latin and Hebrew languages, or any other proficiency in learning or acquirement which he holds to be requisite.

On the other hand, it may be that all which the bishop held requisite was something short of a perfect acquaintance with the Greek language, and that sufficient proof of a classical education and a competent familiarity with classical studies would have satisfied him. If so the degree of such competency ought, in general and sufficiently intelligible language, to be defined. Whatever the standard is, up to which the bishop considers that the clerk's ability ought to come, I am of opinion that the bishop ought to state it in terms sufficiently particular for this Court to consider and decide whether such a standard of learning is required by law as a condition precedent to the clerk's right to be instituted. The responsive plea must be amended accordingly; the costs to be costs in the cause.

On the 23rd of January, 1877, leave having been obtained from the Court enabling the respondent to plead new matter, an amended responsive plea with two exhibits annexed, was filed by the proctors for the defendant (1).

From such responsive plea it appeared inter alia that on the 3rd of January, 1877, the patroness of the rectory of Drayton-Parslow had duly presented a clerk other than the promovent to the rectory of Drayton-Parslow, and had on the 16th of January, by writing under her hand and seal, expressly revoked her presentation of the promovent to the rectory, but that a caveat against the institution of any person to the rectory had been lodged by the proctor for the promovent.

February 27, 1877. *Dr. Swabey*, on behalf of the defendant,

(1) One of these exhibits consisted of the copies of the questions and answers which formed the subject of the examination of the promovent on the 26th of May, 1876.

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moved the Court to dismiss the defendant from the suit; the promovent being dead.

The motion was supported by an affidavit which stated that the death of the promovent had occurred on the 17th of January, 1877.

Dr. Tristram, on behalf of the executors of the promovent, did not oppose the motion.

The Court granted the motion but made no order as to costs.

Proctor for promovent: *Brooks.*

Proctors for Bishop of Oxford: *Moore & Currey.*

[IN THE COURT OF ARCHES.]

Feb. 27.

HOWARD AND OTHERS *v.* BODINGTON.

Public Worship Regulation Act, 1874 (37 & 38 *Vict.*, *c.* 85), *s.* 9.—*Jurisdiction—Service of Representation on Respondent—Enactment not merely Directory*

The 9th section of the Public Worship Regulation Act, 1874, provides that unless the bishop, to whom a representation of illegal acts or omissions on the part of any incumbent within his diocese has been sent, shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation. . . . "he shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of, and shall then transmit the representation to the archbishop, who shall forthwith require the judge to hear the matter of the representation." By s. 16 it is further provided that, if any bishop is the patron of the benefice held by the incumbent respecting whom a representation shall have been made, the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation.

A representation under the above Act, was sent to the bishop of the diocese on the 29th of August, 1876. The bishop received the representation on the 30th of August, and finding that the party complained of was the incumbent of a benefice in his patronage, forwarded it on the 15th of September to the archbishop of the province. On the 21st of October the archbishop transmitted a copy of the representation to the party complained of. The party complained of did not acknowledge the receipt of the copy of the representation so transmitted to him, and though subsequently personally served with a duplicate copy of the representation entered no appearance. Afterwards the archbishop required the judge to hear the matter of the representation:—

Held, that the proceedings were void, and must be dismissed by the judge, for the provision as to the time within which a copy of a representation should be transmitted to the party complained of was imperative, and had not been complied with.

ON the 30th of August, 1876, a representation made in pursuance of the Public Worship Regulation Act, 1874, under the

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hands of Frederick Howard, John Painter, and Samuel Bruce Andrews, three inhabitants for more than one year next before the commencement of the proceedings, of the ecclesiastical district or chapelry of St. Andrew, Wolverhampton, and in which representation the Rev. C. Bodington, the vicar or incumbent of the said ecclesiastical district or chapelry was the party complained of, was received in the diocesan registry of the Bishop of Litchfield.

The patronage of the living of St. Andrew, Wolverhampton, is vested in the Bishop of Litchfield for the time being, and the Bishop of Litchfield, having regard to the provisions of the 16th section of the Public Worship Regulation Act, 1874, directed that the representation should be forwarded to the Archbishop of Canterbury. On the 15th of September the representation was accordingly forwarded to the registry of this court, where it was received on the 16th of September, and was on the 18th of September given by the deputy-registrar of this court to the principal registrar of the province of Canterbury, by whom eventually it was submitted to the Archbishop of Canterbury. On the 21st of October a copy of the representation was transmitted by the archbishop to Mr. Bodington, and was received by him in the course of the next day. Mr. Bodington, however, did not acknowledge the receipt of the copy so transmitted to him, and was afterwards personally served at Wolverhampton with a duplicate copy, under the 6th section of the rules and orders made in pursuance of the Public Worship Regulation Act, 1874 (1).

Subsequently a requisition, signed by the Archbishop of Canterbury under the 9th section of the Public Worship Regulation Act, 1874, was sent to the Dean of Arches (the Right Honourable Lord Penzance), to require him to hear and determine the matter of the representation.

No appearance was entered on behalf of Mr. Bodington.

February 20. *Jeune* appeared on behalf of the complainants.

No counsel appeared for Mr. Bodington.

On the case being called on, the counsel for the complainants

(1) 1 P. D. 3.

stated that he thought it right to call the attention of the Court to the fact that by no fault of the complainants the copy of the representation which, according to the provisions of the 9th section of the Public Worship Regulation Act, 1874, had to be transmitted to the party complained of, had not been transmitted to him until the 21st of October, 1876, more than six weeks after the representation had been sent to the Bishop of Litchfield. He then proceeded further to state in detail the circumstances under which the case had been brought before the Court, as the same are substantially set forth in this report.

His Lordship intimated that the Court was prepared to hear the question argued, whether it had jurisdiction to proceed with the hearing of the case, and suggested that the witnesses proposed to be produced on behalf of the complainants in support of the representation might be examined de bene esse.

The counsel for the complainants thereupon addressed the Court in support of the jurisdiction, contending that the provision in the 9th section of the Public Worship Regulation Act, 1874, with regard to the time of service of a copy of the representation on the party complained of, was merely directory, and that a literal compliance with its terms was not a condition precedent to the Court exercising jurisdiction. The authorities relied on in argument are referred to at length in the judgment.

Witnesses in support of the allegations in the representation were then called and examined on behalf of the complainants.

At the conclusion of the examination his Lordship adjourned the further hearing of the case, in order that the complainants might give formal proof of the date on which a copy of the representation had been transmitted to or served on Mr. Bodington.

Feb. 27. The case came on for further hearing.

The counsel for the complainants produced and examined as a witness a clerk in the office of the principal registry of the province of Canterbury, who formally proved in effect that on the 21st of October last, he had sent a copy of the representation in a registered letter from such registry addressed to Mr. Bodington; that no reply was received thereto, but that Mr. Bodington when after-

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wards personally served with a duplicate copy admitted that the copy first sent had been duly received by him.

LORD PENZANCE. Upon this case coming on for hearing before the Court on a former occasion, the Court thought it necessary that some proof should be given of the period at which the representation was served upon the respondent. The respondent did not appear, and therefore the proceedings of the Court, whatever they might be that had to be taken, must be taken in his absence, and under those circumstances the Court thought it necessary to require proof that the representation had been served upon him, and to know at what date it had been so served. That proof was given in an informal manner on the former occasion, and has been supplemented by the evidence of the witness who has just been called. It appears from that evidence that the Rev. Charles Bodington was served with the representation in this suit on the 22nd of October last, because it was forwarded to him in a registered letter on the 21st, and would reach him on the 22nd of October.

Now, the provisions with respect to these matters in the Public Worship Regulation Act, 1874, are very precise, the statute requires that the representation shall in the first instance be transmitted to the bishop of the diocese of the respondent. The important words of the 8th section of that Act, are as follows:—

"If the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners . . . . being male persons of full age, who have signed and transmitted to the bishop under their hands the declaration contained in schedule A. . . . . shall be of opinion that the incumbent has within the preceding twelve months failed to observe the provisions of the Book of Common Prayer. . . . such archdeacon, churchwarden, parishioners . . . . may . . . . represent the same to the bishop by sending to the bishop a form as contained in schedule B to this Act duly filled up and signed."

A further section of the Act declares that rules and orders shall be made by certain persons for regulating the procedure and settling the fees to be taken, under the Act, so far as the same may be expressly regulated by the Act, and on turning to the rules and

orders it appears that the very first order is: "The representation, declarations, and all other documents required by the Act, or by these rules and orders to be transmitted to the bishop, shall be either delivered at, or sent by post in a registered packet to, the registry of the diocese within the jurisdiction. . . . Such registry is hereinafter called the diocesan registry." Reading, therefore, the first rule with the 8th section, it appears to be the duty of the parishioners to represent what they complain of to the bishop, by sending to the registry of the diocese the form contained in schedule B of the Act. That requisition was duly complied with by the complainants. They sent their representation to the registry, and they sent it at a date which I will mention presently. The next provision of the Act is as follows: "Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, . . . he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing, within twenty-one days, whether they are willing to submit to the directions of the bishop. . . ." That is the provision which gives rise to the question the Court has to consider to-day. It is a provision that the bishop, if he is not of opinion that the proceedings shall be stopped, shall within twenty-one days after receiving the representation, transmit a copy of it to the person complained of. Now, what happened in this case is this, the representation is dated the 29th of August, it was received in the bishop's registry in conformity with the 1st rule of the rules and orders on the 30th of August. That would be, under the statute, the receipt by the bishop, and would be the date from which the twenty-one days, which the statute accorded to the bishop to consider whether proceedings should be taken on the representation, would run.

The twenty-one days would therefore expire on the 20th of September, the bishop having received it on the 30th of August. I believe the bishop was away from home, but that I do not know. The bishop kept the representation until the 15th of September, and on that day appears to have sent it up to the registry of the archbishop, saying that he was the patron of the living, and that the

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archbishop had to act in his place. That was done in conformity with the 16th section of the Act, which says: "If any bishop shall be patron of the benefice . . . held by the incumbent respecting whom a representation shall have been made, or shall be unable from illness to discharge any of the duties imposed upon him by this Act in regard to any representation, the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation." Therefore, in this case, as the bishop was the patron of the living, it is quite plain that from the moment he received the representation it was the archbishop who had to act in his place, which of course he could not do until the bishop sent the representation to him. The bishop, however, did not send it till the 15th of September. The archbishop would receive it on the 16th of September, within four days of the time when, according to the Act, the archbishop would be bound to transmit a copy to the respondent; but the duty of the archbishop acting in place of the bishop was to make inquiries and to consider how far under the circumstances the proceedings should or should not be allowed to proceed. The twenty-one days accorded by the Act to the bishop, or in his place the archbishop, appear to me to have been accorded to him for that purpose. He is to consider whether, in his opinion, it is a proper case for the proceeding to go forward. If he thinks it is not, then he is not to transmit the representation to the respondent at all, but to put his reasons on record.

On the other hand, if the bishop thinks that it is a proper case for the proceedings to go forward, then he transmits a copy of the representation to the respondent. Now those are the duties which, the bishop being the patron of the living, devolved upon the archbishop, and assuming that the archbishop did receive the representation on the 16th of September, he would have only four days within which to exercise that option or that judgment. That obviously is too short a time, and I think that the object of the Act was practically defeated when the representation remained in the hands of the bishop as late as the 15th of September.

But however that may be, what took place was this: Having got to the deputy registrar of this court, I believe, on behalf of the archbishop, it was forwarded to another of the archbishop's

officers. There seems to have been some misunderstanding as to whose duty it was to bring it before the archbishop, and in the result it was not transmitted or served upon the respondent until the 22nd of October, which was more than a month after the twenty-one days had expired.

Now that is the state of things which this Court has to consider; and it has to ask itself the question: What is the consequence of so wide a departure from this provision of the statute? The matter was excellently argued by Mr. Jeune the other day. First, he contended that this Court could not consider the matter at all, because he said if you turn to the statute you will find that the business of the judge is, upon receiving a representation from the archbishop, "to hear the matter of the representation." These are the words of the section of the statute: "The judge shall give not less than twenty-eight days' notice to the parties of the time and place at which he will proceed to hear the matter of the representation." And again, in the same section, "The archbishop shall forthwith require the judge to hear the matter of the representation." Then it was argued that all that the judge has to do is to take the representation and ascertain whether the facts stated in it are true, and to apply the law to those facts, and that there his function begins and ends.

Well, I have considered that argument, which has I think some warrant in the particular language used by the statute. But I think that, upon the whole, the Court could not put so narrow a construction on these words, "to hear the matter of the representation," without doing obvious and great injustice. For instance: suppose that the respondent had never been served with the representation at all, can it really be seriously argued that this Court is bound to shut its eyes to that fact, and to go on and hear the facts and issue a monition against the respondent, who has never been in any way brought into court or attempted to be brought into court? So again: suppose the respondent appears at the hearing and says, amongst other things, that he has never had an opportunity of submitting the matter to the arbitrament of the bishop, and details certain circumstances to shew that in that respect the statute has not been complied with, is the judge to take no notice of that and to say I have nothing to do with that;

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all I have to do is to try the representation. It seems to me that that mode of looking at the matter would involve great and unnecessary expense upon the parties, and would hardly be consistent with the proper intention of the legislature. Well, then, again: suppose it is alleged that both parties agree to be bound by the bishop, but that after all the bishop declines to settle the matter at all, and sends it on to the archbishop, surely that is a matter that the Court is entitled and bound to inquire into, in order to see whether the matter comes properly before it under the provisions of the Act. If this Court cannot undertake those functions, I do not see what other court can, and the result would be that, notwithstanding all these preliminary provisions of the statute had been disobeyed, or not been acted upon, this Court would be bound to go on and hear the case, and issue a monition against the party, although the doing so might be totally contrary to the justice of the case and the intention of the Act. Upon the whole, therefore, I think I must reject that suggestion. Well, then, secondly, it was contended that, although it is a positive provision of the Act that a copy of the representation shall be transmitted to the respondent within twenty-one days from the time the bishop received it, yet that that provision is only what has been called in the law courts "directory." Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still that is the recognised language, and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that

material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belong? Mr. Jeune was good enough to refer me to Sir Benson Maxwell's book "On the Interpretation of Statutes," and to quote a number of cases from it (Maxwell, On the Interpretation of Statutes, ch. xii., sec. 3, pp. 330–345). Since the matter was argued I have been very carefully through those cases, but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of the *Liverpool Borough Bank* v. *Turner*. (1) Lord Campbell was then sitting as Lord Chancellor. In an appeal from the Vice-Chancellor, and in giving judgment, his Lordship said this:—

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

But amongst the cases to which attention was called is a case of *Vaux* v. *Vollans* (2), to which I will call attention, because I think it more nearly resembles the matter we have in hand than any

(1) 29 L. J. (Ch.) 827; 30 L. J. (Ch.) 379; 2 De G. F. & F. 502.
(2) 4 B. & A. 525.

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other that I have met with. *Vaux* v. *Vollans* (1) was an action of debt for penalties against the defendant, the Rector of Hemsworth, for wilfully absenting himself from his benefice without licence or exemption; there was a general plea of nil debet, and at the trial in the county of York it was proved by the agent of the plaintiff's attorney that on the 3rd of April he served a notice of the cause of action, signed by the attorney, on the deputy registrar of the Archbishop of York personally, at his residence at Mountgate, in that city, the public registry being kept in a different place, namely, the office in the minster yard. I should say that the provision of the statute, to comply with which this notice was served, was that no writ should be sued out against any spiritual person for any penalty or forfeiture incurred under the Act, until a notice in writing of the intended writ should have been delivered to him or left at the usual or last known place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese, by the attorney or agent for the parties, so that there was an obligation on the plaintiff's attorney, before he founded the right to maintain the action, to give notice of the action to the bishop of the diocese by leaving the notice at the registry of his diocese. What happened was this: The agent of the attorney did not leave the notice at the registry, but he served it on the deputy registrar at his own house, the registry happening to be shut, and the deputy registrar came and proved that the notice was served, and that the next day he took it to the registry, so that it got there all right on the following day after the deputy registrar received it. Therefore, as far as the substance of the matter was concerned, there was, and never could have been a case in which there was a more perfect compliance with what one would have thought was the object of the statute. But the Court held that the statute having said that the notice must be served by leaving it at the registry, inasmuch as it was not left at the registry by the agent of the attorney, the Act had not been complied with, and so the action failed. In the course of giving judgment, Mr. Justice Littledale said:—

"The statute does require that the delivery to the bishop shall be by leaving the notice at the registry of his diocese. The object that it shall be left in a

(1) 4 B. & A. 525.

place where it is likely to be attended to by the bishop or his officer, may have been attained by its having been first delivered to the deputy registrar and afterwards carried by him to the registry office; but that is not the specific mode of delivery required by the statute. If we hold that a personal service on the deputy registrar was sufficient it might then be said that delivery to a clerk or a porter elsewhere than at the registry office might suffice. I think the safest course is to adhere to the words of the legislature."

In that case the failure was in not serving the notice in a proper form. Here the failure is not serving the notice in a proper time, which, to my mind, is of very much more importance than the form or way in which it was served, provided it got to its ultimate destination. That case is no doubt a strong one to shew that where the legislature chooses to provide for these minute matters with apparent intention that they should be adhered to, no supplemental or different mode which even attains the same end is allowable or permissible, but the proceedings are void. No doubt it may be said that that was a penal statute, a point about which I will say a word presently.

Then, in one of the old cases, I think that of *Rex* v. *Loxdale* (1), the language was somewhat similar. That was a case in which the question was the appointing five overseers, and the statute only allowed four. Lord Mansfield said: "The precise time, in many cases, is not of the essence," and another of the judges added that in the 43rd Eliz. nobody ever thought that the *number* of overseers was discretionary. Lord Mansfield in his judgment, moreover, distinguished between things which, as he said, were the essence of the matter and things that were not, and he also remarked—which is a matter that I think furnishes the strongest argument on this occasion, that the number in the statute having been four there was no number to stop at if the parties exceed four—they might go on without any boundary unless the specified number of four was the limit. That, as I shall point out presently, appears to me to be a matter of serious importance, because if we desert the twenty-one days, the question arises how long may the matter hang over the head of the respondent?

The general result of those cases is what I have pointed out. There is a case of notice to an elector. The notice was sent to his true address. The statute said it was to be sent to the address on the

(1) 1 Burr. 445.

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register, and because it was not sent in accordance with the statute, it was held to be bad, although the fact was that owing to the notice going to his true address, the man got it when perhaps he would not have got it if they had sent it to the address on the register which he had left: *Noseworthy* v. *Buckland-in-the-Moor.* (1)

Then the Court has to consider what is the scope of this enactment. I think nobody can doubt that of all the important steps in the suit there is no step so important as that which regards the service of the first proceedings on the respondent. That which is to give the respondent notice that he is to be made the subject of a suit is the most important step in the whole cause, whatever Court the suit is brought in, or whatever the nature of the proceedings, whether there is an action in one of the Common Law Divisions, in the Chancery Division, in the Probate and Divorce Division, or a suit in the Ecclesiastical Court, there is not a more important step in the cause than that which provides for the service upon the respondent. Because, of course, that which gives notice to him of the proceedings is the only thing that puts him on his defence, and enables him to bring forward all those things that are in his favour. Now, in other courts service upon the respondent or defendant is always carefully provided for. In the Common Law Courts I think a writ after it was issued was only in force for six months, and after that time could not be served unless renewed (15 & 16 Vict. c. 76, s. 11). If it were served a day after the six months without being renewed the service would be void. In the Divorce and Matrimonial Court, where I presided for some years, I recollect perfectly well a personal service on the respondent was required and thought necessary. But in this statute that we are considering, we must bear in mind that really the whole scope of the statute is to provide a new form of proceeding; it is a new form of suit. It has been said over and over again that this statute constituted a new court, but it did not constitute a new court; it created a judge of the existing provincial court; and what it did constitute was a new form of proceeding. The legislature chose to point out in these various sections the particular steps which should be taken, and minutely to tie the parties down to a particular time, and when they came to provide for the

(1) Law Rep. 9 C. P. 233.

machinery of the Act being carried out by rules and orders, they expressly, in the 19th section, excepted those matters that were expressly regulated by the Act. Therefore, the question that we are inquiring into was really, as far as one can see, one treated by the legislature as one of considerable importance. The service upon the respondent is practically the beginning of the suit, because the bishop after he receives the representation may say that the proceedings should not go on at all, and the very first step that really gives life and vigour to the suit is the service upon the respondent.

Now, as I said just now, if twenty-one days is not to be adhered to, what limit is there to the time within which it would be lawful to serve this notice upon the respondent? That is a matter that has pressed more upon my mind than any other. It seems to me that there is no limit. Can it be said that, the statute having said that the service of the representation should be within twenty-one days, it would be perfectly lawful, and that the suit could proceed, although the representation was not served for a year or even two years? This is matter not without importance, because the statute provides that the representation must complain of something that the incumbent has within the preceding twelve months failed to observe, and therefore the suit cannot commence except for a matter that has happened within a year. Well, but if another year is to be taken before the representation is served upon him such delay seems to me to be very much at variance with the intention of the legislature. If the service of the representation is looked upon as what it really is, namely, the commencement of the suit, it is practically extending the period within which the suit may be brought from one year to two, or for ought I know, to three; and there seems to be no limit if the period specified in the Act is once deserted.

It is said, and said truly, that if the bishop chose to hold this representation back, and not to serve it, either one or other of the parties might push the bishop on; but suppose they did not; suppose the suit hangs over for a year or eighteen months, is the Court to pass by the irregularity, and say that, notwithstanding that, the proceedings are in order, and that it is competent to the Court to entertain them?

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On the other side, in opposition to those views, it has been argued, first of all, that no harm is done to the respondent. I think that everybody will admit that the continuation of a suit, and its hanging over a man's head beyond the time that the legislature provided, is a harm, and the extent of that harm it is perhaps not so easy to measure exactly, but I think it is a harm; at any rate, in neither of the two cases to which I have called attention was there any harm done, because the notice really got to the right place, but what was done was not done in the form provided by the statute, and therefore it was held that the proceedings were void.

Then, again. It has been said, and this was a cogent part of the argument, that this was the act of a third person; I think there is a good deal in that. I think that many things would render the proceedings void if done by the parties themselves, against whom it might be said it was their own fault if the proceedings had failed through their own remissness, which would not render the matter void if done by a third person, and that third person a public officer. Several cases were cited to shew that where a statute had thrown upon a public officer the duty of doing a certain thing in a certain time, and it was not done, the Court held it was directory only. But such cases appear to me to differ essentially from this in the particular to which I have already called attention, namely, that it is of vital importance here to the individual that he should be brought into Court at the time within which the statute says he shall be brought into Court.

Then, again it is said that this is a provision intended only for the benefit of the complainants, and it is no doubt considerably for the benefit of the complainants, because they file their representation, and of course they wish to go forward with their suit.

If the bishop holds it back, he is doing them a wrong, but I am unable to see that it is not also a provision intended for the benefit of the respondent, and I do not think the Court is at liberty to speculate too narrowly as to what the motives of the legislature were. They have chosen to provide a definite time within which the representation is to be served, and the question is whether, the matter being one of essential importance, the Court is at

liberty to throw what the legislature have provided aside, upon some speculation that they intended it for the benefit of the complainants and not for the benefit of the respondent.

Then, lastly, it was said if what has occurred in this case is held to be fatal to the proceedings, you will put it in the power of the bishop indirectly to defeat the proceedings if he chooses, by not choosing to forward the representation. There is some truth in that, no doubt, but I do not think that is an argument to which the Court can listen; the Court can hardly entertain the supposition that a person holding the position of a bishop would take such a course, not only such an illegal course, but a course so sinister and so utterly unworthy of one holding the rank of a bishop in this country. It is not my business to make suggestions on such subjects beyond certain limits, but I apprehend if any course of that sort were taken, the party would not be without a remedy, and if he suffered injury by the bishop wilfully holding back the representation, and not serving it, the Courts of this country would provide some remedy for it.

Upon a review, therefore, of these matters, and after full attention to the excellent argument that I heard upon the subject, I have come to the conclusion that these proceedings cannot go forward. I think the statute has prescribed a particular form to be followed, and that the Court is not at liberty to cast the time mentioned aside, upon any speculation as to the possible reasons why that particular provision was adopted. I foresee that were the Court to take an opposite view, it would be very difficult to know where to stop in future, and very difficult to work out this Act in the way in which I think the legislature intended it to be worked out. It is with regret, therefore, that I am obliged to say that these proceedings must come to an end, but at the same time there is this reflection, that the matters that are charged in this representation are pretty nearly all of them—not all of them, I think, but the most part of them—matters that are now under appeal in a case with which we are all acquainted, the judgment in which has not been given, and probably, I should think, will not be given for another two months (1). Therefore the parties here are quite capable of commencing afresh, and filing a fresh

(1) *Ridsdale* v. *Clifton*, post, 276.

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representation, and then matters will go forward in their regularity, and the determination of the suit will not be ultimately much delayed.

Solicitor for complainants: *Girdlestone.*

July 17.

[IN THE COURT OF APPEAL.]

THE ANNANDALE.

Forfeiture — Intent to conceal British character of Ship — Sale to bonâ fide Purchaser for value after Offence committed, but before seizure by the Crown —Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104) *s.* 103, *sub.-s.* 2.

A cause of forfeiture, under the 103rd section of the Merchant Shipping Act, 1854, was instituted on behalf of a British officer of Customs against a vessel seized for an alleged infringement of the provisions of that section. The plaintiff in his statement of claim alleged that on the 18th of July, 1874, one of her owners being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as defendant, a statement of defence and counter-claim was delivered on his behalf, which in the 7th paragraph thereof set up the defence that on the 6th of July, 1876, the defendant became bonâ fide purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. The plaintiff demurred to the 7th paragraph of the statement of defence:—

Held, affirming the decision of the Judge of the Court of Admiralty, that the demurrer must be allowed; for that the property in the vessel was divested out of its former owners, and vested in the Crown immediately on the commission of any of the offences in respect of which, under the provisions of the section, the penalty of forfeiture was imposed.

THIS was an appeal by the defendant Hans Lowe from a decision of Sir R. Phillimore allowing a demurrer to the statement of defence in an action of forfeiture under the 103rd section of the Merchant Shipping Act, 1854, and holding that the ship *Annandale*, which was proceeded against in such action, was vested in the Crown at the time of the commission of the offences charged in the statement of claim. (1)

The pleadings and arguments are fully set forth in the previous report.

(1) Ante, p. 179.

Patchett, Q.C., and *Milvain*, for the appellant.

The *Admiralty Advocate, Dr. Deane, Q.C.*, and *E. C. Clarkson* (*Sir J. Holker, A.G.*, with them), for the plaintiff.

Patchett, Q.C., in reply.

In addition to the cases cited in the Court below, the following authorities were referred to: Comyns' Digest, "Forfeiture;" *United States* v. *Brigantine Mars* (1); *Hubbard* v. *Johnstone* (2); *The Helena* (3).

July 17. JAMES, L.J. I think we must confirm the decision of the learned judge of the Court of Admiralty in this case. He proceeded upon the authority of two cases—two old English cases (4)—which seem to have decided very much, indeed, almost the same point, that is to say that where a forfeiture was imposed by a statute in similar terms to those made use of in the section before us, the property was divested by the offence committed, for that is the substance of those cases, and upon some cases decided after very great consideration by the Supreme Court of the United States of America, (5) in conflict with the opinion of Mr. Justice Story, expressed in an elaborate disquisition (for that is certainly what it is) which we have heard to day, and which he delivered, having dissented from the decision of the majority of the Court in one of those cases. Those authorities seem to me to be very strong, and I agree with the language, if I may say so, of the Chief Justice of the Supreme Court of the United States, that the decision in those cases really turned upon the language of the statute. It seems to me that the language of the statute in this case is substantially the same as the language of the statute in *Wilkins* v. *Despard*, (6) and it is that if a certain offence is committed the ship shall be forfeited. The 103rd section of 17 & 18 Vict. c. 104, does not say that the ship shall be liable on conviction of the offence to be forfeited, but that the ship itself shall by reason of the offence be forfeited; and it goes on to say that the officer of the customs

(1) 8 Cranch. 417.
(2) 3 Taunt. 177.
(3) 4 C. Rob. 3.
(4) *Robert* v. *Wetherhead*, 12 Mod. 92; *Wilkins* v. *Despard*, 5 T. R. 112.
(5) *United States* v. *Bags of Coffee*, 8 Cranch, 398; *Gelston* v. *Hoyt*, 3 Wheat. 311.
(6) 5 T. R. 112.

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shall seize the ship and shall bring her into court for adjudication. Therefore it is impossible to deny that by the offence the ship has made herself liable to forfeiture, and has been seized under that liability, and I cannot see how that liability is got over by any dealing with the person who is the owner, and who has committed the offence for which liability attaches. It may be said it is a hard case, and those hardships are dwelt upon at great length by Mr. Justice Story, but those hardships are reduced in a great number of cases, and practically we do not find that any injustice will really arise. Purchasers do not often fall into difficulties which must exist in a case of this kind, or even in that which is more common, the case of purchasing property which has been stolen. However, that is an inconvenience men must suffer if they buy property which happens to be in the possession of a person who is not the rightful owner. According to the view of the law which has been taken upon the cases I have referred to, the property of the rightful owner may be divested the moment a person has committed the offence for which it is to be forfeited, and being divested he cannot vest it in anybody unless there be a statutory provision to that effect, a provision like our law with regard to the sale of stolen goods in market overt, where a person who has no title does give a title to a purchaser. Without such a provision the person whose title is divested cannot give a title to any other person, however innocent that person may be. However, if there is any case of hardship, no doubt the Crown will always take that into its merciful consideration. I am of opinion, therefore, that the decision in the Court below should be affirmed.

BAGGALLAY, L.J. I am of the same opinion. It appears to me that the opposite construction of the 2nd sub-section of the 103rd section of the Act would substantially render that section a dead letter; for the claim for protection is based upon this, that there is no actual forfeiture until adjudication, or at any rate until seizure; and if that were the true construction of the Act no distinction could be drawn in the case of a purchaser for value with or without notice. If that be the case, as in almost every instance where any act is done, which is made punishable

under the 2nd sub-section, it is done in secret, it would not be impossible to make a sale of the ship before the time when any seizure could be made, or before the time when an adjudication could be brought about.

Reliance has been placed on the provision in the latter part of the section in which directions are given as to the process by which the ship is seized, and by which adjudication is obtained, but it appears to me those provisions are for the benefit of the shipowner, in order to afford him the opportunity to shew that the seizure was improper. If he can shew that the vessel was not liable to forfeiture at the time, then it could not be treated as a forfeiture, and in that case if the officer of the customs had not good ground for making the seizure, the officer is to be subjected to make amends as the Court may think fit to direct.

COTTON, L.J. I am of the same opinion. The section which applies to this case is the 2nd sub-section of the 103rd section of the Act, aided by the proviso at the end of it. That second sub-section is to the effect that if a master shall so offend the ship shall be forfeited, and not as has been contended, that it shall on adjudication be forfeited. The forfeiture results immediately on the offence being committed, and if there is any argument raised as to the construction of the words, "the ship which has become subject to forfeiture," then I say those words are not sufficient to alter what in my opinion is the true construction of the 2nd sub-section of the 103rd clause, which is that the forfeiture takes place when the act is committed. There is nothing, therefore, to shew that the decision that the person conveying to the appellant had no title is wrong, and in my opinion the judgment of the Court below is right.

I should mention that in the case of *Wilkins* v. *Despard* (1) there were similar provisions with regard to proceedings taken before the Admiralty Court, and in respect of any ships seized under that Act; all admirals were required to bring in as a prize all such ships as should offend, and they were to be delivered over to the Court of Admiralty, and they were to be proceeded against. I should say that is even stronger than the words of the present

(1) 5 T. R. 112.

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section, and I should be unwilling, even if my opinion were contrary to what it is, to decide contrary to the decision in the appeal after the words contained in *Wilkins* v. *Despard*, (1) but I am of opinion that on the commission of the offence the ship was forfeited, and that the forfeiture was not a subsequent thing.

JAMES, L.J. The appeal will be dismissed with costs (2).

Solicitors for appellant: *Oliver & Botterell.*
Solicitor for respondent: *Toller.*

July 31.

THE PECKFORTON CASTLE. [O. 225.]

Regulations for preventing Collisions at Sea—Articles 12 *and* 17.

A ship and a barque were both on the port tack. The barque was the leading vessel, and had the wind three points free; the ship was close hauled and was overtaking the barque:—

Held, that it was the duty of the vessel with wind free to keep out of the way of the other.

THIS was an action of collision instituted on behalf of the owners of the barque *August* against the owners of the *Peckforton Castle*, and was heard before Sir Robert Phillimore assisted by two of the Elder Brethren of the Trinity Corporation.

Clarkson and *Hall* for the plaintiffs.
Butt, Q.C., and *Myburgh* for the defendants.
The facts sufficiently appear from the judgment.

SIR R. PHILLIMORE. It has been very properly admitted by the counsel on both sides that the real question at issue is whether the 12th or the 17th Article of the Regulations for preventing collisions at sea applies to the facts and circumstances of this case.

(1) 5 T. R. 112.

(2) Nov. 6. The action came on this day for hearing before the Judge of the Admiralty Court. No person having appeared for the defendants,

The *Admiralty Advocate, Dr. Deane, Q.C.* (*E. C. Clarkson* with him), moved the Court to decree the *Annandale* to be forfeited to her Majesty, and to condemn the defendants in the costs.

SIR R. PHILLIMORE made the decree asked for.

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The 12th article provides that, "when two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side;" (that is not the present case), "except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way. . . . ." Now, the wind, according to the *Peckforton Castle*, in this case the defendant and a counter-claimant, was N.W. by N., and according to the statement of the *August* was N. The *Peckforton Castle*, according to her own statement, was heading N.E. and by N. a little before the collision, and N.E. at the time of the collision—the *August* was heading about E. It appears that there was a difference of four points in the direction of their heads, and both had the wind on the port side.

The collision was caused by a sliding blow; the *Peckforton Castle* from leeward striking the starboard beam of the other vessel the *August* about her main rigging. Now the *August* admits in this case that she had the wind three points free. She says she saw the ship three points abaft her on her lee beam, and the question therefore comes to this, which of these two rules is to be preferred as governing this case? Does the rule which says, "the ship with the wind free shall get out of the way of the other" override, or is it consistent with, the rule that "every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel."

That is a question of course on which one pronounces with a certain amount of diffidence in spite of the assistance which I have had from the Elder Brethren of the Trinity House. But I am of opinion that the vessel which had the wind free was being overtaken by the faster ship, and, although the faster ship was close hauled, yet as both had the wind on the same side I am of opinion that the rule which governs this case is the rule which is contained in the latter part of the 12th article. I think the vessel which had the wind admittedly free ought to have ported in time to avoid a collision—at all events she ought to have taken any steps which were necessary to avoid the collision. I say again, I pronounce my opinion with great diffidence, but my

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opinion on the best judgment I can form in this matter is that the rule that applies in this case is that the vessel which has the wind free shall keep out of the way of the other. I must, therefore, pronounce the *August* alone to blame.

Solicitors for plaintiff: *Thomas Cooper.*
Solicitors for defendant: *Gregory, Rowcliffe, & Co.*

June 22.

THE CYBELE. (O. 519.)

Salvage—Board of Trade—Steam-tug and Life-boat belonging to Ramsgate Harbour—The Harbours and Passing Tolls Act, 1861 (24 & 25 *Vict. c.* 47), *pt. vii.—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 484, 485.

Under the Harbours and Passing Tolls, &c., Act, 1861, Part VII., the harbour of Ramsgate and the property and powers of its trustees are transferred to the Board of Trade. In a suit for salvage remuneration for services rendered by a vessel belonging to the harbour, and vested in the board, under the provisions of the act:—

Held, that the vessel was not "one of her Majesty's ships" within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 484, 485), and that the claims must be adjudicated upon without the consent of the Admiralty in the section last mentioned.

THIS was a cause of salvage instituted on behalf of the owners, master, and crew of the *Ben Achie*, against the steamship *Cybele*.

On the 20th of February last the owners of the *Cybele* having appeared, the judge gave leave to them to serve a notice on the Board of Trade, the owners of the steam-tug *Vulcan*, and the master and crew of the *Vulcan*, and the crew of the *Bradford*, a life-boat at Ramsgate, calling upon them to enter an appearance in the action in order that their claims, if any, for salvage services rendered to the *Cybele* might be adjudicated upon. Notices having been served in pursuance of the leave so given, the solicitors for the Board of Trade entered an appearance on behalf of the Board of Trade, and the master and crew of the *Vulcan*, and the crew of the *Bradford*. On the 13th of March, the judge directed that the solicitor for the Board of Trade should have the conduct of the action, but afterwards on the 13th of April an order was made by

consent that the solicitors for the owners, master, and crew of the *Ben Achie* should have the conduct of the action.

On the 26th of April the statement of claim was delivered in the action. It alleged, inter alia, that on the 24th of December, 1876, whilst the *Ben Achie* was lying at anchor off Deal Pier awaiting orders from her managing owner, in reply to her master's telegram to such owner, the attention of those on board was, at about 10.30 P.M., attracted by signals from the *Gull* light vessel; that the *Ben Achie* then went in search of the vessel supposed to be in distress, and after some time found the *Cybele* ashore between the East Goodwins and the North Sand Head, with the *Vulcan* and the *Bradford* in attendance; that the *Vulcan* and the *Ben Achie* having made fast to the *Cybele* ultimately succeeded in towing her off the ground, and bringing her up in safety in the Downs off Deal, where the three vessels arrived at about 10 A.M., on the 25th of December. The statement of claim then proceeded in the 31st, 33rd, and 36th paragraphs, inter alia, substantially as follows:—

31. Upon arrival off Deal the master of the *Ben Achie* received the expected telegram from his managing owner, directing him to proceed to Weymouth to fulfil an engagement from which the sum of 165*l.* would have been realised. This telegram would have been received on the previous evening had the *Ben Achie* remained at her anchorage. The *Cybele* being deprived of her steam power and having only one anchor, the master of the *Ben Achie* determined to remain by the *Cybele*, and did not attempt to fulfil the said Weymouth engagement, it being then too late for him to do so.

33. By rendering her said services the *Ben Achie's* hawser was damaged to the extent of 50*l.*, and she lost the benefit of the said Weymouth engagement, and the *Vulcan* lost a hawser worth 25*l.*

36. The owners, master, and crew of the *Vulcan* and *Bradford* have appeared in this action, pursuant to notice served on them by the defendants, and claim salvage for their services.

On the 8th of May, counsel, on behalf of the defendants, moved the judge in Court to order the 31st article of the statement of claim and the words "and she lost the benefit of the said Weymouth engagement" in the 33rd article of the same to be struck out. The motion was opposed by counsel on behalf of the plaintiffs, but was granted by the Court, on the ground that the said 31st paragraph alleged matters which the Court could not take into consideration in awarding salvage remuneration in the action.

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On the 14th of May the solicitors for the defendants delivered their statement of defence. The 10th paragraph thereof was substantially as follows:—

> The Board of Trade are the owners of the *Vulcan* and the National Life-boat Institution are the owners of the *Bradford*. Neither the Board of Trade nor the National Life-boat Institution have made or could make any claim in this action in respect of their ownership of their respective vessels and the tackle belonging to them.

The plaintiffs, in the 2nd paragraph of their amended reply, alleged that the Board of Trade owned the *Vulcan*, and further alleged that the Board of Trade, and not the National Life-boat Institution, were the owners of the *Bradford*, and that the Board of Trade could and did make a claim in the action in respect of both vessels and the tackle belonging to them respectively.

The following rejoinder was delivered:—

> 1. The defendants join issue upon so much of the 2nd paragraph of the reply as relates to the National Life-boat Institution.
>
> 2. The defendants demur to so much of the 2nd paragraph of the reply as relates to the Board of Trade, and say that the same is bad in law, on the ground that it is contrary to the provisions of the Merchant Shipping Act, 1854, and on other grounds, &c.

June 22. *Myburgh*, and *W. G. F. Phillimore*, for the defendants, in support of the demurrer. The defendants are entitled to succeed on the demurrer, inasmuch as the *Vulcan* and the *Bradford* being vessels employed in the public service of the Crown are clearly within the provisions of the 484th section of the Merchant Shipping Act, 1854. That section prohibits any salvage claim being made in respect of the use of "any ship belonging to her Majesty," whilst the next succeeding section requires that the consent of the Admiralty be obtained before the "commander" or crew of any of her Majesty's ships can claim salvage remuneration. It may be that vessels belonging to the Board of Trade are within both of these sections, but it is enough for the defendants to contend that the application of the first of the two sections is not merely restricted to ships under the control of the Admiralty, such as are, more properly speaking, her Majesty's ships, and are known in this court as Queen's ships, but was intended by the legislature to extend to all vessels, the loss of which, as would be the case here (24 & 25 Vict. c. 47, s. 36), would be supplied out of

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the public funds: *The Cargo ex Woosung* (1), *The Earl Dufferin* (2), *The Thetis.* (3) Under the 7th part of the Harbours and Passing Tolls Act, 1861, the harbour of Ramsgate is vested in the Board of Trade, together with all property belonging to it, and has thereby become a public harbour; and by the 28th section of the same Act the Board of Trade are to receive a percentage on all salvage in respect of ships or property brought into the harbour. The legislature could not have meant that the owners of salved vessels should in addition to paying this percentage have to satisfy the claims of the Board of Trade, as if the vessels belonging to the harbour belonged to private owners.

E. C. Clarkson and *Wood Hill* (*Cohen, Q.C.*, with them) for the plaintiffs. Neither the 484th, nor the 485th section of the Merchant Shipping Act, 1854, can have any application to vessels owned, as the *Vulcan* and the *Bradford* are by the Board of Trade, not as a public department under the Crown, but as the existing trustees of the harbour of Ramsgate. Up to the time of the passing of the Harbour and Passing Tolls Act, 1861, the then trustees of the harbour were entitled to claim salvage in respect of the use of the vessels belonging to the harbour, and the 23rd section of the same Act secures to the Board of Trade all the rights possessed by the trustees before the transfer. The legislature could never have intended that the operation of this clause should be restricted by the provisions of the 484th and 485th sections of the Merchant Shipping Act, 1854, which were passed whilst the harbour was vested in the former trustees. Moreover, the provisions of the 28th section of the Harbours and Passing Tolls Act, 1861, instead of supporting the defendant's contention are really in favour of the plaintiffs, as that section, far from taking away the capacity of the Board of Trade to earn salvage remuneration in respect of vessels belonging to the harbour, confers the additional right of claiming a percentage on all salvage remuneration which may be paid, or become payable in respect of salvage services rendered to all vessels brought into the harbour, whether such vessels belong to the harbour or not. Moreover the Court of Admiralty has before now awarded salvage

(1) 1 P. D. 260. (2) 7 N. of Cas. Sup. p. xxxiii.
(3) 3 Hagg. Adm. 14, at p. 61.

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remuneration to the Board of Trade and the master and crew of the *Vulcan* in respect of the services of that vessel: *The Lord Straithnairn.* (1)

Myburgh in reply. The language of that part of the Harbours and Passing Tolls Act, 1861, which relates to Ramsgate Harbour, is very different from that employed in the same Act with respect to the harbours of Dover and Whitby, which are not vested in the Board of Trade, but in commissioners.

SIR ROBERT PHILLIMORE:—In this case a question of some curiosity and nicety is raised for the first time in this court, as to the construction of certain sections of the Merchant Shipping Act, 1854, in comparison with the provisions of 24 & 25 Vict. c. 47, the Act which is called "The Harbours and Passing Tolls Act, &c., 1861."

Now it must be taken as admitted, for the purpose of the present discussion, that the steam-tug *Vulcan*, and the life-boat *Bradford*, both belong to Ramsgate Harbour, and came out of Ramsgate Harbour to render the salvage services in this case. These facts being admitted, the question to be decided on the demurrer is, whether the *Vulcan* and the *Bradford* are her Majesty's ships, in the sense in which that phrase is used in the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104. If they are such ships in the sense there used no remuneration at all can be claimed on behalf of the vessels themselves; and their crews, and the master of the *Vulcan* can only claim remuneration for salvage services after obtaining the permission of the Lords of the Admiralty to make such a claim. The sections in the Merchant Shipping Act, 1854, to which I have referred, are headed "Salvage by her Majesty's ships," and the first section of the two—section 484—is as follows:—

"In cases where salvage services are rendered by any ship belonging to her Majesty, or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage, or risk thereby caused to such ship, or to the stores, tackle, or furniture thereof, or for the use of any stores, or any other articles belonging to her Majesty supplied in order to effect such services, or for any other expense or loss sustained by her Majesty by reason of such services."

(1) Adm. Court, May 14, 1875.

The next section is:—

"No claim whatever on account of any salvage services rendered to any ship or cargo, or to any appurtenances of any ship by the commander or crew, or part of the crew of any of her Majesty's ships, shall be finally adjudicated upon, unless the consent of the Admiralty has first been obtained, such consent to be signified by writing under the hand of the Secretary to the Admiralty. . . ."

The rest of the section, it is not necessary to read. The first contention has been that there is a distinction between "any ship belonging to her Majesty," in sect. 484, and "any of her Majesty's ships," in sect. 485. I am unable to follow the subtlety of that distinction. I think that the two sections are in eadem materiâ and both relate to those of her Majesty's ships, with regard to which it is declared by the 485th section of the Merchant Shipping Act, 1854, that no salvage reward on account of any services rendered by their commanders or crews shall be made without the consent of the Admiralty. The contention of the defendants in support of the demurrer is now brought forward for the first time, but that circumstance does not dispose of any difficulty that may arise on the construction of the above sections. At the same time if such a construction as the defendants contend for is the right one, it is remarkable that, inasmuch as the *Vulcan* was not what Lord Stowell would call a novus hospes in the Court of Admiralty, the question now raised should not have been brought forward before. Then how does 24 & 25 Vict. c. 47, affect the question? It is said that the purport of that portion of 24 & 25 Vict. c. 47, which relates to the present question, is that the harbour of Ramsgate, then vested in the trustees of the harbour, shall be transferred with all its incidents to the Board of Trade, who are, it is contended, consequently the trustees of Ramsgate Harbour. Then there follows a provision cited for a different purpose, but which really on examination appears to me to be very adverse to those who are contending for the validity of this demurrer; the 28th section of the same Act providing that the Board of Trade shall receive a percentage on any salvage earned by all vessels using the harbour—not by vessels belonging to Ramsgate Harbour, but by any vessels brought into the harbour. I, myself, cannot come to any conclusion otherwise than in favour of the plaintiffs, though I admit the case may be plausibly stated the other way. I cannot

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think, on examination of the sections of 24 & 25 Vict. c. 47, which relate to Ramsgate Harbour, that it was the intention of the legislature to place a tug and a life-boat, belonging to Ramsgate Harbour, which, before that Act passed, were owned by the trustees of the harbour, in the category of her Majesty's ships. It is true that in one sense the *Vulcan* and the *Bradford* are to be considered as belonging to the Crown, because they are owned by the Board of Trade, and the Board of Trade is a department under the Crown. But, still, Acts of Parliament must be read in the light of common sense, and, looking to the wording of the sections I have referred to, I am of opinion that this attempt to place this tug and this life-boat, belonging to Ramsgate Harbour, in the category of her Majesty's ships, and, in consequence, to require the Court to hold that the Board of Trade are not entitled to salvage remuneration so far as the services of the vessels themselves are concerned, and that before any salvage suit can be brought to recover in respect of the services of their commanders and crews the consent of the Admiralty is required, cannot be really maintained. I must, therefore, pronounce against the demurrer.

The case was then heard upon the merits before the Judge, assisted by two of the Elder Brethren of the Trinity Corporation. Witnesses on behalf of the plaintiffs were examined orally in court. On behalf of the plaintiffs, it was proved, inter alia, that the *Bradford* was owned by the Board of Trade, and not by the National Life-boat Institution. No evidence was given as to the consent of the Admiralty having been obtained to the prosecution of the salvage claims made by the master and crew of the *Vulcan* and the coxswain and crew of the *Bradford*.

THE COURT, after hearing arguments on behalf of the plaintiffs and the defendants, awarded 500*l.* to the owners, master, and crew of the *Ben Achie*, and 1200*l.* to the owners, master, and crew of the *Vulcan*, and the owners, coxswain, and crew of the *Bradford*.

Solicitors for owners, master, and crew of the *Ben Achie*: *Clarkson, Son, & Greenwell.*

For owners, master, and crew of the *Vulcan* and the *Bradford*: *Solicitor for the Board of Trade.*

Solicitors for defendants: *Pritchard & Sons.*

THE ANDALUSIAN. (A. 342.)

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Aug. 7.

Collision—Precautions to be taken by those in charge of Vessel about to be launched on the River Mersey—Burden of Proof.

When a vessel is launched in a river, the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions, and of giving such notice as is reasonable and sufficient to prevent any injury to passing vessels.

Circumstances in which it was held that proper precautions had not been taken.

8 P.D. 75
11 Q.B.D. 120

THIS was an action of damage instituted on behalf of the owners of the ship *Angerona* her master and crew and the owners of her cargo against the ship *Andalusian*, and against F. Leyland & Co., shipbuilders, her owners intervening as defendants. The action was brought to recover damages sustained by the *Angerona* in a collision which occurred on the River Mersey on the afternoon of the 14th of July last, when the *Angerona*, in tow of a tug, was run into by the *Andalusian* on the occasion of the latter vessel being launched from the defendants' shipbuilding yard on the Cheshire side of the river.

The 7th, 8th, 9th, and 12th paragraphs of the statement of claim were substantially in terms as follows:—

7. The said collision was caused solely by the neglect or default of those having charge of the *Andalusian*, and of the operations for launching her, and was not caused by any default or neglect on the part of the *Angerona* or her tug.

8. The *Andalusian* was improperly launched at a time when the river opposite the said shipbuilding yard was not clear.

9. A proper, sufficient, and usual notice and warning of the said launch was not given prior to the said launch.

12. Those in charge of the *Andalusian* and the said launching operations improperly neglected to keep a good look-out.

The defendants in the 2nd paragraph of the statement of defence alleged in substance as follows:—

2. Before the *Andalusian* was launched, and whilst she was being launched, she had flags flying on poles fitted where her masts were to be, and a flag at her bow and two flags at her stern; she had two steam-tugs which were decorated with flags in the river in attendance on her, and boats were also lying in the river in readiness to pick up the timber used in launching her, and proper warning and proper public notification had been given that she was about to be

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launched, and those on board any vessel in the neighbourhood could and ought to have seen that she was about to be launched, and she was fitted with the usual and proper anchor and tackle.

The subsequent paragraphs of the statement of defence contained allegations to the effect that, just before the *Andalusian* began to move, the *Angerona* and her tug were seen by those who had charge of the launch about half a mile distant, and higher up the river than the *Andalusian*, and stationary, or nearly so, and not in the way of the *Andalusian*, and the river was clear for the *Andalusian* to be launched; that after the dogshores had been knocked away it was impossible to stop the *Andalusian*, and the *Angerona* and her tug were seen to be coming ahead at a considerable speed; that thereupon the tug of the *Angerona*, instead of keeping on ahead, improperly stopped her engines, and the *Andalusian* shortly afterwards with her rudder and sternpost came into collision with the port side of the *Angerona*, and that those on board the *Angerona* and her tug neglected to keep a good look-out, or to keep on the Liverpool side of the river as they ought to have done.

Aug. 4, 6, 7. The action was heard before the Judge and two of the Elder Brethren of the Trinity Corporation.

Benjamin, Q.C., Myburgh, and *W. G. F. Phillimore,* appeared for the plaintiffs.

Butt, Q.C., and *E. C. Clarkson,* for the defendants.

The evidence so far as material to this report is stated in the judgment.

[The following authorities were referred to: *The Vianna* (1), and *The Glengarry.* (2)]

Aug. 7. SIR ROBERT PHILLIMORE. This is a case of collision which took place in the River Mersey on the 14th of July in this year between one and two o'clock in the afternoon. It took place in this way—by a vessel called the *Andalusian* being launched stern foremost into the river and striking the port side of a vessel called the *Angerona* with her stern, the *Angerona* being at that time in tow of a tug and going down the river on her road to sea.

(1) Swa. 405. (2) Note, post, p. 235.

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The question which the Court has had to consider, with the assistance and advice of the Elder Brethren of the Trinity House, has been whether, looking at the law which I will presently state, the *Angerona* was to blame for this collision, and as there is a counter-claim, whether the *Andalusian* was to blame.

Now with respect to what is the law when a vessel is launched in a river like the Mersey, the Court was under the necessity on a former occasion of laying down fully the law on this point in the case of *The Glengarry*. (1) I may state briefly that I am of opinion that the law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reasonable and sufficient to prevent any injury happening from the launch; and, moreover, that the burden of shewing that every reasonable precaution has been taken, and every reasonable notice given, lies upon her and those managing the launch.

Now the case on the part of the *Angerona* is briefly this: She was coming out of the Canning Dock and going across the river in tow of a tug called the *Gladiator*—the facts which I am about to state are not controverted. On her way she passed some flats very close indeed, so close that, to avoid a smash and in order to pass with safety, she ported her helm for a vessel called the *Andrew Lovatt*, which was going to sea in charge of a tug, but at a much greater speed. I think that there is no doubt that it was proved that there was a proper look-out on board the *Angerona*, and that she was properly navigated. It is also a fact, and one of some importance in this case, and it is not denied that the *Angerona* left the Canning Dock at ten minutes past one o'clock, and that the collision took place at thirty-six minutes past one o'clock not far from Seacombe, so that there were twenty-six minutes to be accounted for. According to the evidence it appears to me and to the Elder Brethren of the Trinity House that the tug of the *Angerona* may have taken about ten minutes in easing her engines, in order to faciliate the operation of discharging a party of riggers who were on board the *Angerona*. There would then remain fifteen minutes to be accounted for. It appears to us that this is not an unimportant fact. The plaintiffs say that the *Angerona* in the

(1) See post, p. 235.

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position she was and whilst moving slowly down the river was run into by the stern of the *Andalusian*, and received very serious damage.

Now the case on behalf of the *Andalusian* briefly stated is this, that she was to come off the ways on the 14th of July, and that it was well known, as no doubt the fact is, that she was to come off a little before two o'clock or thereabouts. First of all the defendants say we discharged the obligation the law cast upon us by giving a proper notice of the launch, and taking all due precautions we caused to be put up in the pilot house at Seacombe, the following notice: [His Lordship here read the notice (1), and after observing that the pilot of the *Angerona* stated that he had not seen it, and that there appeared to be no legislative obligation on him to have done so, proceeded]:—I am clearly of opinion that the putting up of the notice was not a precaution that could avail in any degree as a substitute for other precautions which it was necessary for those in charge of the launch to take. Then the defendants say that the other precautions taken by them were these, that there were five flags upon the ship about to be launched, and there were two tugs, and those tugs had two boats; one of the tugs was stationed ahead of the launch, and it is stated that the tug so stationed was not decorated with flags in the usual way to give an indication that the launch was about to take place. It has also been proved by many respectable shipowners who have given evidence in this case, that their usual habit is to employ one of the tugs in attendance on the launch, not only to see that the way is clear, but to give notice to any vessel that is passing that a launch is about to take place. It would seem, according to common sense, that to give notice of the launch to passing vessels must be the principal object for which tugs are employed. Now there is evidence in this case that those on board both the tug ahead of the launch, and the gig near her, were aware of the presence of the *Angerona*, but took it for granted that the master and crew of the *Angerona*, knew that there was a launch, and therefore

(1) The notice was signed by the superintendent of pilotage, and contained a direction to the pilots that they should as far as possible comply with the request of Messrs. Leyland & Co., that no vessel might be anchored in such a position as would interfere with the launching of a steamer from their building yard at Seacombe on Saturday next, July 14, 1877.

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gave no notice to her that it was about to take place: [His Lordship then passed to a consideration of the evidence as to the look-out kept on board the launch, and expressed an opinion that the pilot stationed on the look-out to inform those in charge of the launching operations when the vessel might be safely launched had neglected to make a proper report:—]

Now, it appears to me if the law I have stated be correct, namely, that it is the duty of those in charge of the vessel about to be launched to apprise the navigation, and give every reasonable notice that a launch is about to take place, then it is apparent from the defendants' own evidence that the obligation cast on the plaintiffs by the law has not been discharged in this instance: that being so without going further into the case I have, with the approbation of the Elder Brethren of the Trinity House, come to the conclusion that the *Andalusian* is alone to blame for this collision, and I so pronounce.

Solicitors for plaintiffs: *Duncan, Hill, & Dickinson.*
Solictors for defendants: *Simpson & North.*

[IN THE COURT OF ADMIRALTY.]

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Feb. 7.

THE GLENGARRY. (L. 127.)

PD 223

THIS was a cause of damage instituted on behalf of the Bridgewater Navigation Co., as owners of the flats or barges, *Industry* and *Atlas*, their cargo and freight against the ship *Glengarry*, and against her owners, defendants intervening.

Feb. 7. The case was heard before the judge, assisted by two of the Elder Brethren of the Trinity Corporation.

Aspinall, Q.C., and *Gully*, appeared for the plaintiffs.
Butt, Q.C., and *Myburgh*, for the defendants.

The nature of the pleadings, the result of the evidence and the arguments of counsel, with the authorities referred to by them, can be sufficiently gathered from the judgment.

SIR ROBERT PHILLIMORE. On the 23rd of October in last year, shortly before high tide, between noon and a quarter-past 12 or twenty minutes past 12, in the River Mersey, the *Glengarry* which was then launched from the Liverpool side of the river went stern foremost into the port-bow of the *Industry*, which afterwards struck the portside of the *Atlas*, they being two out of a

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number of vessels called flats which were on the port and starboard-side of a tug called the *Bridgewater*, and the question for the Court is who is to blame for this collision, whether the tug which had these two vessels in tow is to blame, or whether the *Glengarry*, the launch, is to blame having regard to all the circumstances of the case.

It may be almost unnecessary to make any observations on the general law relating to these cases of vessels launched, after the full discussion which they have undergone in the three cases to which reference has been made: the case of *The Blenheim* (1); the case of *The Vianna* (2); and the more recent case before the Judicial Committee of the Privy Council, *The United States*. (3) There is no doubt whatever as to the law which has been laid down for a considerable period and always observed in this court, namely, that it is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening from that event, and that the burden of proof lies on them. There is no doubt at all that those who defend the cause of the launch have the obligation cast upon them of shewing that it took place in such circumstances as ought, with reasonable precautions on the other side, not to have brought her into collision. What is reasonable notice must of course depend very much on the facts of each case. It was very well said in the case of *The Blenheim* (1), that what is "reasonable notice" depends "upon local circumstances, as for instance, the breadth of the river, the number of vessels passing, and other circumstances of that kind." "It must not be a mere general notice that a launch is to take place on a particular day;" the notice must so specify the time of the launch that vessels navigating up and down the river may not be damaged or incur danger.

The first subject which the Court must consider is whether according to the evidence in this case there was such reasonable notice as the law requires given by those who launched the *Glengarry*?

Now the *Glengarry* was a very large vessel, I think of 1800 tons. She was launched from the slip of Mr. Royden on the Liverpool side of the Mersey, and it appears from a variety of evidence which it is not necessary to go into in detail, that it is customary in the River Mersey before a launch takes place that a certain number of flags should be put on poles which are placed where the masts are to be, if it is a barque or a ship three poles; a brig two poles; that there should be a certain number of flags put on poles in the vessel as indicating that the vessel is about to be launched.

It appears that it is customary to have two steam-tugs in attendance on the vessel, and for one of the steam-tugs to have flags of various kinds on it, and it appears also, that it is customary to have gigs pulling about, in order to pick up some of the timber, which would otherwise be lost when the operation of launching takes place. All these precautions were taken in this instance, and it is not denied, and could not be denied, that the proper and usual general notice was given that the launch was about to take place.

It is said that a more specified notice was required, and various suggestions were made as to what the specific notice should be, but no evidence was produced

(1) 2 Wm. Rob. 421; 4 N. of C. 393. (2) Swa. 405.
(3) 12 L. T. (N.S.) 33.

before me at all that any such special notice is habitually given in cases of this description. One witness indeed, did say that it was usual that a tug should be in mid-river just before the vessel is launched; but that witness stood almost alone in his opinion, and the pilot who was produced on behalf of the plaintiffs in the case, in enumerating what precautions were necessary to be taken in order that a launch should take place in safety, did not mention that it was a necessary circumstance that there should be a tug-boat in mid-river; but he did recapitulate all these precautions, which, as a matter of fact, were taken in this case.

The yard or slip from which this launch took place, is one in which it appears from the evidence a great number of vessels were built, and I think the evidence was that a considerable number were launched every year. I think Mr. Royden who was examined, said twelve or thirteen. Therefore, putting all these circumstances together, I am of opinion that the principle of the law to which I have referred, justifies me in saying that there was, on the evidence, not only a general notice, but a sufficient notice according to the usage of the place that a launch was about to take place. At this time it was known perfectly well that the launch could only take place very near to the time of high water.

Now high water was about twenty-four minutes past 12 on this occasion. The collision took place, I think, about a quarter past 12, and the launch took place about six or seven minutes past 12, according to the best calculation one can arrive at. One is always liable to be a little erroneous when one comes to a minute fraction of time, but it appears, after the best consideration that I can supply, that that is as nearly as possible the correct period.

I must mention what has made a considerable impression on the mind of the Court. It appears not only from the evidence produced on behalf of the plaintiffs, but also from that produced on behalf of the defendants, especially the evidence of the master of the tug *Bridgewater*, that the *Glengarry* stood very high on the ways, and that there was nothing to prevent the master of the *Bridgewater* seeing her from the Morpeth Dock, and that in fact, he did see her from there, and must have seen that she had her proper flags up. It becomes necessary to make some short statement with regard to the tug and the flats. The *Bridgewater* came out of Morpeth Dock with, I think, eight or nine flats in tow, so many on her port quarter and so many on her starboard quarter.

Now, according to the statement of the master of the tug, the *Glengarry*, with the flags indicating an approaching launch, was visible to him before he came out of the dock. He knew, for the reasons which I have already stated, that the launch would take place very nearly about high water, and I admit the proposition that was contended for by the counsel for the plaintiffs, in this case, that it is not competent to those who are about to launch a vessel to block up the navigation, not only for a day but for a considerable period of time. But in this case, the evidence satisfies the Court, that the master of the tug must have been aware that the launch would take place within a very short time of high water, say twenty minutes or a quarter of an hour, and that being made plain to him when he was in the Morpeth Dock it was his duty, as it appears to the Court, after consulting with the Elder Brethren of the Trinity House, who are entirely of the same opinion—it was the duty of the tug, when in Morpeth Dock, either to wait a quarter of an hour or twenty minutes, if she thought there was any danger to be incurred by the launch; or it was her duty

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when she came out (she had full option to choose which course she would take) to have ported her helm and to have kept up on the west shore, in which case the collision would not have happened.

According to the evidence, we believe she did not take this course, and, indeed it seems to be perfectly well proved in the case, that she came out into mid-channel. Now what precautions were taken besides those general precautions I have mentioned by those who were about to launch the *Glengarry*? Really it seems every caution that could be required was taken. The look-out so far from being as suggested, a bad look-out, appears to have been of a very good description; the pilot says he was aft on the ship; there were two tugs in attendance, plying about an hour before. Then he says, he looked to see if the river was clear, he saw three flats, and he waited till they got clear; he looked again to see if the way was clear, and then he gave the order to let go. Mr. Royden, who was on a stage under the bows, himself performed what I believe is the usual ceremony on such occasions, of cutting the ropes, and the vessel began to move. After the vessel had so begun to move, the pilot called out "hold on," or "stop the launch," and it has been contended that if he had discharged his duty properly he would have said that before the vessel began to move, and before the last rope had been cut. But the Court is not of that opinion. It may very well be, as was very ingeniously suggested by Mr. Myburgh, that as this tug and the flats came out of Morpeth Dock, they came in a direct line and did not present themselves to the view of the pilot, until the vessel had parted. But be that as it may, there was no necessity for any collision in this case if the tug had taken the proper course of keeping along the west shore. We believe upon the evidence, that the tug when reported had arrived a quarter of a mile north-north-west of Mr. Royden's slip in mid-channel, and was not, as she represented herself to have been, off Tranmere Ferry. The *Glengarry* had to go 800 yards to the place of collision, and she was stopped in mid-river against the flat into which she ran. In fact, when the whole case comes to be examined, it resolves itself into this, that in our judgment the tug steamed right across the path of the *Glengarry*, and that she did nothing but go on full speed, and took no measures whatever to avoid the collision. Having arrived at this conclusion, it seems unnecessary in my judgment, to go into the other parts of this case, and I have no hesitation in pronouncing under the advice I have received, that the plaintiffs in this case have failed to establish the averments in their petition, and that I must reject that petition.

Solicitors for plaintiffs: *Isham; H. E. Gill.*
Solicitors for defendants: *Bateson & Co.*

THE AGINCOURT. (C. 116.) 1877
April 17.

Jurisdiction—Foreign Vessel—Co-ownership.

An action of co-ownership was instituted on behalf of a foreigner against a foreign vessel. On the vessel being arrested an appearance under protest was entered for another foreigner, who applied that the action should be dismissed.

It appeared that the representative of the state to which the ship belonged declined to interfere, and the Court dismissed the action with costs.

THIS was an action instituted on behalf of a Spanish resident at Liverpool, against the barque *Agincourt* and her freight. The writ in the action was indorsed as follows:—

The plaintiff's claim is for the purpose of enforcing his right as a part owner of the *Agincourt*, and to have an account of her earnings taken.

The vessel was arrested in the action, and on the 22nd of March an appearance under protest was entered on behalf of the owner of the *Agincourt*, and notice was given on his behalf that the judge in Court would be moved to order that the action be dismissed with damages and costs, on the ground that the Court had no jurisdiction.

Affidavits on behalf of the defendant were filed in support of the motion. In such affidavits it was alleged in effect that the defendant, a Spanish subject, usually resident at Bayona, in Spain, had purchased the *Agincourt*, and had caused her to be repaired at a considerable cost; that in the month of March the *Agincourt* had been duly registered as an Argentine vessel, and a provisional register, available until her arrival at any Argentine port, and describing the defendant as her sole owner, obtained from the Argentine consul at Liverpool; that the plaintiff being desirous of having an interest in the vessel, it was agreed that he should have a quarter of a share of the vessel on his paying therefor one-fourth of the purchase-money paid by the defendant, and also one-fourth of the outlay for the repairs, outgoings, and disbursements for the next voyage; that the plaintiff had not fulfilled the agreement; and that the vessel was under charter, and the defendant was liable in damages in consequence of the arrest and detention of the vessel. It was further alleged that no notice of

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the institution of the suit or of the arrest of the vessel had been given to the Argentine consul by the plaintiff.

On behalf of the plaintiff an affidavit was filed, which stated that the English register of the *Agincourt* had been closed, and that she had been registered as an Argentine vessel on the 1st of March last, but that the closing of her English register and her registration as an Argentine vessel had been without the plaintiff's consent.

March 28. *G. Bruce,* on behalf of the defendant, moved in accordance with the notice of motion. It is very doubtful whether under any circumstances the Court would have jurisdiction to entertain a suit like the present where not only the ship proceeded against is a foreign vessel, but all parties to the action are foreigners: *The Johan and Siegmund* (1); 36 & 37 Vict. c. 66, s. 34; but however this may be, it is clear that the Court in cases of possession where foreigners alone are concerned, will decline to exercise jurisdiction unless the accredited agent of the foreign state to which the ship belongs has given his consent: *The See Reuter* (2); *The Evangelistria.* (3)

R. A. Pritchard, for the plaintiff, contrà. The Court will not decline to exercise jurisdiction where, as here, it can do complete justice between the parties. [He referred to *The Evangelistria.* (3)]

SIR ROBERT PHILLIMORE. The motion must stand over in order that a communication may be made to the consul of the foreign state to which the ship belongs. I think that application ought to have been made to the Argentine consul earlier in the suit, and that the plaintiff is entitled to the costs of the application to-day.

April 17. *G. Bruce* renewed his motion.

Pritchard, for the plaintiff, stated that application had been made to the Argentine consul, but that he had declined to intervene.

SIR ROBERT PHILLIMORE. There are no such special circumstances in this case as existed in the case of *The Evangelistria* (3),

(1) Edwards, 242. (2) 1 Dodson, 22.

(3) Note post, 241.

and led the Court in its discretion to exercise jurisdiction in that case. I shall order that the action be dismissed with costs, but I shall not give damages. 1877 THE AGINCOURT.

Solicitors for plaintiff: *Chinery & Aldridge.*
Solicitors for defendant: *Neal & Philpot.*

THE EVANGELISTRIA. (E. 298.)

1876 *Aug.* 8.

THIS was an action instituted on behalf of Constantine Emperikos, against the Greek ship *Evangelistria*, and against Gianuli N. Piangos and George N. Piangos intervening as defendants under protest.

It appeared by the endorsement of the writ in rem that the plaintiff claimed to be the sole owner or mortgagee of the *Evangelistria*, and to be entitled to have possession of the vessel decreed to him, or to have her sold for the repayment of money due to him.

The defendants delivered a petition on protest, alleging, inter alia, that the plaintiff and the defendant were subjects of the King of Greece, resident within the kingdom of Greece, and praying the Court to pronounce against its jurisdiction, and dismiss the suit with damages and costs.

An answer on protest was thereupon delivered by the plaintiff. Such answer on protest contained, inter alia, averments to the effect that in pursuance of a decree of the Court of First Instance at Syra, in Greece, pronounced in a suit instituted by the plaintiff against the defendants, the Greek consular authorities in this country, being the proper authorities in that behalf, dismissed the defendants from the said ship on her arrival at Falmouth, and put her into the possession of a master appointed by the plaintiff; that subsequently the defendants ejected the master so appointed by the plaintiff from the ship, forcibly took possession of her, and at the date of the answer on protest still remained in possession of her against the will of the plaintiff and the said authorities.

August 8. The case came on to be heard on the pleadings on protest before the judge.

Benjamin, Q.C., and *W. G. F. Phillimore*, for the defendants, in support of the petition on protest.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiff.

The acting consul of Greece in London was produced as a witness on behalf of the plaintiff, and, in answer to the Court, stated that he had received instructions from the Greek Government, and was desirous that the Court should exercise jurisdiction in the suit.

The result of the evidence on the other parts of the case appears from the judgment.

[The following authorities, in addition to those mentioned in the judgment, were

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referred to on behalf of the defendants: *The Innisfallen* (1); *The Highlander* (2); *Simpson* v. *Fogo* (3); 24 Vict. c. 10, s. 11; *The Cathcart* (4); and 3 & 4 Vict. c. 65, s. 3.]

SIR ROBERT PHILLIMORE. This case has been very carefully and elaborately argued, and it raises a question by no means free from difficulty, but at the same time a careful examination of the matter results in this, that the only question the Court has to determine is whether it has jurisdiction to examine into the claims of the respective parties to the suit. The contest is between two foreigners, each claiming possession of the vessel, one contending that he is the actual possessor, and that he had never parted with the property in the ship by sale or otherwise, the other contending that the right to the possession of the ship had passed to him. One of the pieces of evidence which has been submitted to the Court is the judgment of the Greek Court of First Instance at Syra in favour of the ownership of the plaintiff. Against this judgment many objections have been taken, but it has been put in force by the Consul-General of Greece so far as it was competent for him to do so, and the Consul-General has expressed his desire that this Court should exercise jurisdiction in the matter. Now, it has been contended that this Court has no jurisdiction in questions of mortgage, except the jurisdiction conferred by recent statutes, and it has been contended that whatever jurisdiction the Court may have respecting mortgages of British ships, it ought not to interfere in questions arising respecting foreign ships. The Court, however, has occasionally been in the habit of entertaining suits between foreigners in matters of admiralty law and jurisprudence. In this case the question is whether the plaintiff is not to all intents and purposes the owner of the vessel. In the case which has been cited, *The See Reuter* (5), Lord Stowell said that the Court never intervenes unless with the consent of the parties or the intervention of the representative of the foreign state, devolving the jurisdiction of his own country on this Court, and then he proceeded to consider whether the authority which was produced in that case should be considered equivalent to the consent of an accredited agent, and he said, "Here is a judicial order or decree by the burgomasters and counsellors of the city of Rostock in senate assembled, and in whom the admiralty jurisdiction of that city is said to be vested, directing the master to deliver up possession of the ship to Mr. Martens. This document, officially subscribed by the prothonotary of Rostock, is given under the seal of that city, and its authenticity is not denied on the part of the master. I am of opinion that this instrument arms the Court with sufficient authority." (6)

Now, what are the facts of this case? That there is a primâ facie judgment of a competent Greek court in a matter where two subjects of Greece are concerned, pronouncing in favour of the plaintiff's right to this vessel, and that judgment, whatever its fault may be, has been as I have already mentioned acted upon by the consul-general of Greece in this country, and he has said expressly that he wishes the jurisdiction of this Court to be exercised. Now, without entering into

(1) Law Rep. 1 A. & E. 72.
(2) 2 Wm. Rob. 109.
(3) 1 H. & M. 195; 1 J. & H. 18; 29 L. J. (Ch.) 657; 32 L. J. (Ch.) 249.
(4) Law Rep. 1 A. & E. 314.
(5) 1 Dodson, 22.
(6) 1 Dodson, 22–24.

the argument which appears to me to deserve considerable attention as to the provisions in the Judicature Acts with respect to the jurisdiction of the High Court, I think, for the reasons I have stated, that I ought not to decline to exercise jurisdiction so far as to inquire into the position of the respective parties. As it is undesirable that the ship should remain under arrest I should allow the arrest to be removed if bail is given.

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Solicitors for plaintiff: *Pritchard & Sons.*
Solicitors for defendants: *Toller & Son.*

THE HORLOCK. (W. 61.)

1877 May 29.

Co-ownership—Fraud—Bonâ fide Purchase for Value—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104) *s.* 43.

An action of co-ownership was instituted on behalf of G. W. against a British vessel, and against J. H., defendant intervening. The statement of claim alleged, inter alia, that by bill of sale duly registered in 1867 the defendant, as sole owner of the vessel, transferred for valuable consideration a moiety of the same to one T. W., and that T. W., by a subsequent bill of sale duly registered in 1876, transferred the said moiety of the vessel to the plaintiff for value. The defendant, in his statement of defence, denied that he had at any time signed a bill of sale transferring any shares in the vessel to the said T. W., and alleged, inter alia, that if any such bill of sale had been registered, the same was made and registered fraudulently. At the hearing of the action the registration and execution of the bills of sale were proved. The Court thereupon directed that the question whether the fraud alleged could affect the rights of the plaintiff should be raised on demurrer. The plaintiff thereupon demurred to so much of the statement of defence as alleged fraud:—

Held, that the demurrer must be sustained on the ground that, the legal ownership in the moiety of the vessel having passed to the plaintiff for valuable consideration by the execution and registration of a bill of sale without notice of fraud, the plaintiff had thereby acquired a title to the same as against the defendant.

THIS was an action of co-ownership instituted on behalf of George Wright against the British ship *Horlock* and against John Horlock intervening as defendant.

The statement of claim in the action was delivered on the 12th of February last. The first, second, and third paragraphs thereof contained the following allegations:—

2. By a bill of sale duly registered on the 11th of June, 1867, the defendant, John Horlock, who was then sole owner of the abovenamed ship *Horlock*, transferred to Thomas Worraker, of Maldon, in the county of Essex, thirty-two sixty-fourth shares of the ship for the sum of 320*l.*

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3. By a subsequent bill of sale, duly registered on the 16th of December, 1876, the said Thomas Worraker transferred his said thirty-two sixty-fourth shares of the ship to George Wright, the plaintiff, for the sum of 175*l*.

The statement of claim then alleged in substance in subsequent paragraphs that the defendant had had the entire management and command of the *Horlock* from the 11th of June, 1867, down to the time of the delivery of the statement of claim, and had from time to time down to the 24th of September, 1874, rendered accounts of the earnings of the vessel to the said Thomas Worraker, but that no accounts of her earnings had been rendered since that date; that the plaintiff had made several ineffectual applications to the defendant for an account of the subsequent earnings of the vessel; and that the plaintiff was dissatisfied with the management of the vessel and consequently desired that she should be sold.

In the statement of defence delivered on the 19th of February the defendant, after a denial of the allegations contained in the second paragraph of the statement of claim, alleged in substance as follows:—

2. The defendant never at any time signed any bill of sale transferring any shares whatever of the said ship *Horlock* to the said Thomas Worraker, and if any such bill was registered as alleged on the 11th of June, 1867, in the said 2nd paragraph (which the defendant denies) the same was made and registered fraudulently and without the knowledge, consent, or authority of the defendant.

3. The defendant does not admit the allegations contained in the 3rd paragraph of the statement of claim, and says that if the said Thomas Worraker transferred any shares of the said ship to the plaintiff as alleged (which the defendant does not admit) he did so wrongfully and unlawfully, and that he had not any possession of, or right to or in respect of or concerning the said shares.

May 5. The action came on to be heard before the judge in Court.

G. Bruce, and *A. H. Poyser*, for the plaintiff.

Charles Hall, and *F. W. Raikes*, for the defendant.

On behalf of the plaintiff the execution and registration of the bills of sale were proved. During the cross-examination of one of the witnesses called on behalf of the plaintiff to prove the execution of the bills of sale, a discussion arose as to whether questions put by the defendant's counsel to the witness for the purpose of ascertaining whether the bill of sale of the 11th of June, 1867,

was not made and registered fraudulently were admissible, and the Court directed the question whether the fraud alleged in the statement of defence with regard to the making and registration of the bill of sale of the 11th of June, 1867, could, as a matter of law, affect the rights of the plaintiff, to be formally argued on demurrer. The hearing of the case was therefore adjourned.

Subsequently a demurrer to the statement of defence was delivered; it was in terms as follows:—

The plaintiff demurs to so much of the defendant's statement of defence as alleges that the bill of sale, registered on the 11th of June, 1867, was made and registered fraudulently and without the knowledge, consent, or authority of the defendant, and says that the same is bad in law, on the ground that as it is not alleged that the plaintiff was party to or had knowledge or notice of the said matters alleged, the said matters alleged afford no defence to the action, and on the ground that the plaintiff, having purchased from the registered owner the shares claimed for a valuable consideration and without any notice of fraud, has a good legal and equitable title, and is entitled, notwithstanding the said matters alleged, to the relief sought for in this action, and on other grounds, &c.

May 14. *G. Bruce*, and *A. H. Poyser*, in support of the demurrer. It must be assumed that the plaintiff had no notice of any fraud. The sole question therefore for the Court to determine is, whether when a bonâ fide purchaser for value without notice of fraud has become possessed of a legal title, his rights can be interfered with on the ground that his predecessor on the register has been guilty of fraud. Now there are many authorities which shew that in cases of mistake: *Holderness* v. *Lamport* (1), *The Rose* (2), or as against one of the immediate parties to a suit whose name has been placed on the register either by his own fraud, or by a fraud of which he has actual or constructive notice: *The Innisfallen* (3); *The Empress* (4); *The Margaret Mitchell* (5); the Court has the power to grant, and will, where there has been no laches, grant relief: *Hooper* v. *Gumm* (6); *Stapleton* v. *Haymen* (7); *Orr* v. *Dickenson* (8); *The Princess Charlotte* (9). But all such cases are consistent with the proposition that matters not appearing on the

(1) 29 Beav. 129; 30 L. J. (Ch.) 489.
(2) Law Rep. 4 A. & E. 6.
(3) Law Rep. 1 A. & E. 72.
(4) Sw. 160.
(5) Sw. 382.
(6) Law Rep. 2 Ch. 282.
(7) 2 H. & C. 918; 33 L. J. (Ex.) 170.
(8) Johnson, 1; 28 L. J. (Ch.) 516.
(9) B. & L. 75; 33 L. J. (P. M. & A.) 188.

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register will not be inquired into to the prejudice of innocent persons, who have acquired an interest in the vessel by purchase for valuable consideration: *Ward* v. *Beck* (1); *Gardner* v. *Cazenove* (2); *Bell* v. *Blyth* (3); *Follett* v. *Delany.* (4) It is a well known principle of equity that from a bonâ fide purchaser for value without notice, nothing which he has honestly acquired can be taken away: *Scholefield* v. *Templer* (5); *Pilcher* v. *Rawlins* (6); *Heath* v. *Crealock.* (7) Not only does this principle apply in the present case, but the 43rd section of the Merchant Shipping Act, 1854, is an express declaration by the legislature, that the registered owner of any shares in a ship has power absolutely to dispose of such shares. The defendant will probably rely upon sect. 3 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), but the equities there referred to are clearly only such equities as exist between owners and mortgagees. Assuming the bill of sale of the 11th of June, 1867, to have been registered fraudulently, yet the transaction was, at the most, only voidable: *White* v. *Garden* (8), and the defendant who has lain by so many years cannot impeach it now that the vessel has passed into the hands of a third party.

Willis, Q.C., and *F. W. Raikes*, on behalf of the defendant. Most if not all the shipping cases relied on by the plaintiff were decided previously to the passing of the Merchant Shipping Act Amendment Act, 1862, and some of them previously to the Merchant Shipping Act, 1854. They can therefore afford little or no guide to what the present state of the law is, unless they are considered together with the provisions of 25 & 26 Vict. c. 63, s. 3. The effect of that section is that although the register book is still to be kept clear from all notice of equitable rights, yet, inasmuch as such rights are no longer to be disregarded, evidence as to what is behind the register must be admissible for the purpose of proving their existence. It may well be, that the plaintiff's name must be retained on the register, but that at the

(1) 13 C. B. (N.S.) 668; 32 L. J. (C.P.) 113.
(2) 1 H. & N. 423; 26 L. J. (Ex.) 17.
(3) Law Rep. 4 Ch. 136.
(4) 2 De G. & Sm. 235; 17 L. J. (Ch.) 254.
(5) 4 De G. & J. 429; 28 L. J. (Ch.) 452.
(6) Law Rep. 7 Ch. 259.
(7) Law Rep. 10 Ch. 22.
(8) 10 C. B. 919; 20 L. J. (C.P.) 166.

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same time the rights secured to him as registered owner can only be exercised by him as a trustee for the defendant. If the cases referred to on behalf of the plaintiff are considered in order of date, it will be apparent that even before 25 & 26 Vict. c. 63, the doctrine of going behind the register, had become greatly extended, and the same cases read together with sect. 3 of that Act, establish that wherever fraud is alleged it is now the duty of the Court to look behind the register to the full extent, and decide whether it would not be in accordance with equity that the party complaining of the fraud should not be restored to those rights, which but for the commission of the fraud he would still possess. On this point, the language of the decisions in *Holderness* v. *Lamport* (1), and *Orr* v. *Dickinson* (2) is strongly in favour of the defendant. The fact that a legal title has been obtained through a transaction founded on fraud, is not alone sufficient to prevent the interference of a Court of Equity: White and Tudor, Leading Cases in Equity, 3rd ed. vol. ii. p. 25. *Donaldson* v. *Gillott* (3); *Eyre* v. *Burmester.* (4) In the case of *The Empress* (5) decided in the Court of Admiralty the fraudulent sale of a vessel was set aside, notwithstanding that the purchaser had a legal title.

Poyser, in reply.

SIR ROBERT PHILLIMORE. The question of law to be decided in this case has now been properly raised on demurrer. It appears from the statement of claim that the *Horlock* was a sailing ship trading between London and Ipswich, that by a bill of sale duly registered on the 11th of June, 1867, the defendant, John Horlock, who was then the sole owner of the *Horlock*, transferred to Thomas Worraker thirty-two sixty-fourth shares of the ship for the sum of 320*l.*, and that by a subsequent bill of sale Thomas Worraker transferred his thirty-two sixty-fourth shares in the *Horlock* to George Wright, the plaintiff in the action, for the sum of 175*l.* Now the defendant has delivered a statement of defence containing, amongst other things, a general denial of the allegations of the plaintiff, and alleging that he, the defendant, never at any time signed any bill of sale so transferring any shares whatever in the ship *Horlock*:

(1) 29 Beav. 129; 30 L. J. (Ch.) 489.
(2) Johnson, 1; 28 J. J. (Ch.) 516.
(3) Law Rep. 3 Eq. 274.
(4) 10 H. L. C. 90.
(5) Sw. 160.

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that he never sold any shares to Thomas Worraker; and that if any such bill of sale was registered, or authorized to be registered, it was fraudulently registered and without his knowledge, consent, or authority. Some evidence was taken before the Court on the former occasion when these averments underwent discussion, and the Court suggested that the more expedient course would be to raise the question of law which appeared to result from the evidence on demurrer; and that suggestion being adopted by the counsel on both sides, a demurrer has been delivered, and the question which I have now to decide is whether such demurrer is a valid demurrer or whether it should be overruled. The demurrer is as follows:—[His Lordship here read the demurrer as above set out.]

It is to be assumed, for the purpose of discussing the validity of this demurrer, that the bill of sale of the 11th of June, 1867, was fraudulently made and registered without the knowledge of the defendant, and the question arises whether the plaintiff, who is to be assumed also to have purchased from the registered owner certain shares for valuable consideration and without notice of fraud, has a good legal and equitable title. Now the section, the construction of which governs this case, is the 43rd section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, the words of that section are:—

> No notice of any trust, express, implied, or constructive, shall be entered in the register book or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration.

Now a great number of cases which the ingenuity and industry of counsel have furnished to the Court have been cited bearing upon the general question of fraud in analogous cases, but I hope it will not be considered any disrespect to the learning and industry of the counsel, to whom I am greatly indebted for their research, if I decline to enter into a consideration of those cases, because the material point in the case must turn upon the plain meaning of the section of the Act of Parliament to which I have referred, and in spite of all that has been said on the more plausi-

ble part of it there is not much difficulty in its construction. I know of no case which has been cited to me to the contrary—at all events I am satisfied that the predominance of authority in the cases cited before me would sustain this proposition, viz., that a purchaser purchasing from an owner of registered property for a valuable consideration without any notice of fraud, and combining therefore a legal and equitable title, is not liable to have such title impeached on the ground of fraud to which he was not a party; such fraud being between the person who at the time of the purchase appeared on the register as owner and another person. I should observe here that the ownership is still registered, according to the bill of sale in question. Now the law appears to be concisely laid down in the case of *Heath* v. *Crealock* (1), in 1874, by the Court of Appeal in Chancery. The passage to which I am about to refer contains what was there said by Lord Justice James upon the general question. That learned judge says:—

> With regard to the purchasers, it appears to me that there are two cardinal principles and rules of this Court which are involved both on the one side and the other. The first I take to be this, which in my opinion, is a rule without exception, that from a purchaser for value without notice this Court takes away nothing which that purchaser has honestly acquired.

That term in the judgment appears to govern this case. Here is a purchaser for value without notice who has honestly acquired some interest in these shares. His Lordship goes on to say:—

> If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this Court, in my opinion, has no right to interfere with him; and it would be, in my judgment, interfering with him if, through the form of a decree directing a sale instead of a foreclosure, or anything of that kind, it merely did indirectly that which it would not do directly—deprive him of possession of land or deeds in favour of the plaintiff.

I do not know what words can more exactly apply to the present case, and I must presume that to be a correct enunciation of the law; and if that be, generally speaking, a correct statement of the law, it is, if I may so express myself, à fortiori, applicable to a case arising under the 43rd section of the Act in question; because the object of the section, as it appears to me, was to give evidence of title by the name of the owner appearing upon the

(1) Law Rep. 10 Ch. 22, at p. 33.

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register. It is not necessary that I should say that in no case would the Court inquire into the question whether a bill of sale, as is alleged in this case, transferring shares in a vessel, had been registered in fraud. It is not necessary that I should decide that question; but the question which I have to decide, and which I desire to be understood alone to decide is that, assuming the purchaser in this case to have purchased without notice of fraud for a valuable consideration under this bill of sale and to have so become possessed of these shares, and also, which is a point that should not be omitted, to have got his name upon the register, in such a case it is not competent to the Court (to use the phrase used on the argument of this case) to look behind the register for the purpose of dispossessing an innocent purchaser whose name is on the register. He combines, in my judgment, both a legal and equitable title, of which it is not competent to this Court to dispossess him. I must, therefore, sustain the demurrer. The costs of the demurrer will be costs in the cause.

May 29. *A. H. Poyser*, on behalf of the plaintiff, moved the judge in Court ex parte to restrain the defendant "from further mortgaging or creating any charge in or otherwise dealing with any share or shares in the vessel *Horlock*." [He referred to the Rules of the Supreme Court, Order LII., Rule 3. (1)]

The motion was supported by an affidavit which, inter alia, alleged that during the pendency of the action the defendant had by a registered mortgage mortgaged his thirty-two sixty-fourth shares in the *Horlock*,—the moiety in the vessel not alleged to have been transferred to Worraker,—there being at such time a previous mortgage of such shares upon the register; and that unless the defendant was restrained from creating any further charge on the said shares, the said shares would not be of sufficient value to satisfy the plaintiff's claim for the earnings of the vessel from 1874 to the time of the making of the affidavit, and the costs of the action.

THE COURT made an order restraining the defendant in the terms of the motion until the 29th of August, 1877, but re-

(1) See also 17 & 18 Vict. c. 104, s. 65; 36 & 37 Vict. c. 66, s. 16; and *Nicholas* v. *Dracachis*, 1 P. D. 72.

serving leave to the defendant to move the Court to rescind the order. (1) 1877

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June 26. The action was heard.

A. H. Poyser, for the plaintiff, moved the Court to order a sale of the vessel.

THE COURT granted the motion.

Solicitor for plaintiff: *F. B. Jennings.*
Solicitor for defendant: *Moss.*

[IN THE COURT OF APPEAL.] *July* 20.

CHEESE *v.* LOVEJOY.

[1876 H. 16.]

Will—Revocation—7 Will. 4 & 1 *Vict. c.* 26, *s.* 20—"*Otherwise destroying.*"

A testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured:—

Held, that the will was not revoked, the words "or otherwise destroying" in 7 Wm. 4 & 1 Vict. c. 26, s. 20, not being satisfied, as, whatever the testator intended, the will had not been actually injured.

THIS was an action to obtain probate in solemn form of the will, dated the 3rd of July, 1849, of John Harris, who died on the 13th of May, 1876, with three codicils, one dated the 3rd of July, 1849, and the two others the 21st of September, excluding from the probate all the alterations and interlineations appearing on the will.

That those instruments were originally well executed was not seriously contested. The plaintiff under the will was a beneficial legatee of a considerable part of the testator's personal estate and a devisee of a considerable part of his freehold estate. The heir-at-

(1) No application was ever made to rescind the order. Copies of the order were subsequently served on the solicitor for the defendant and on the registrar of shipping and seamen at the Custom House, London.

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law and next of kin contended that the testamentary instruments had been revoked.

The evidence as to revocation was to the following effect:—The will and codicils were at the testator's death found upon the kitchen table. The testator had drawn a pen through the lines of some part of the will, leaving the words perfectly legible, and had written on the back "All these are revoked." A housekeeper who had been nine years with the testator and left in January, 1876, stated that she had heard the testator speak about his wills, and say he had made two or three, but that he had cancelled them and they were good for nothing, and that the testator had in her presence taken up this will and thrown it among a heap of waste papers on the floor. The housemaid deposed that she had first seen the document about eleven years ago in the testator's sitting-room under the cushion on the sofa. That about seven or eight years ago the testator kicked it into a corner of the sitting-room among a quantity of other papers, and that she took it out of the sitting-room, where it was lying by the coal-box along with other scraps of paper, and took it into the kitchen, where she put it on the table. That it was sometimes on the table, sometimes on the kitchen window, and sometimes on a chair, just where she chose to put it, but the testator never asked for it, nor was it produced to him again.

The judge, being of opinion that there was no evidence of revocation within the 20th section of the Wills Act, directed the jury to find a verdict for the plaintiff. The principal defendants excepted to this ruling in order to bring the case before the Court of Appeal (1).

Inderwick, Q.C., and *Middleton*, for the appellants.

It is admitted that unattested cancellation with a pen is not enough to revoke a will: *Stephens* v. *Taprell* (2); but in this case there is an "otherwise destroying" within the meaning of the Wills Act (7 Wm. 4 & 1 Vict. c. 26), s. 20. It is suggested in Williams' Executors (3) that the words are satisfied by throwing the will away with the intention that it should perish. Surely if

(1) See ante, p. 161. (2) 2 Curt. 458.
(3) 5th Ed. p. 117.

a testator threw his will into a pond with the intention that it should perish there, that would satisfy the statute though some one fished up the document uninjured. Here the will was thrown among waste papers with the intention that it should share the usual fate of waste paper.

[JAMES, L.J.:—*Doe* v. *Harris* (1), a case before the Wills Act, is against you. The testator there threw the will on the fire with the intention of destroying it, but as it was not actually injured by the fire, it was held that there was no revocation as to freeholds. You are letting in all the evils of parol evidence. In *Doe* v. *Harris* (2) the same will was held to be revoked as to copyholds, a jury finding that the testator had thrown it in the fire with the intention of destroying it; but there was great reason to suspect that the whole story was false.]

The revocation must depend on the testator's act, not upon what ultimately becomes of the paper.

[JAMES, L.J.:—Then you must read the clause as "burning, tearing, or otherwise destroying the same, or doing some act tending thereto, and indicating an intention to revoke."]

Dr. Deane, Q.C., and *Dr. Tristram*, contrà, were not called upon.

JAMES, L.J. We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the Court below, "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two."

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors: *Merediths, Roberts, & Mills; Bridges, Sawtell, Heywood, & Co.*

(1) 6 Ad. & E. 209. (2) 8 Ad. & E. 1.

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Dec. 5.

MEYERN *v.* MEYERN AND MYERS.

Apportionment of Damages.

A sum of 5000*l.* damages was apportioned by the Court as follows:—1500*l.* was settled on the youngest child of the marriage, aged five years, the only one remaining in petitioner's custody; 1500*l.* was given to the petitioner and also his costs of the suit in addition to those which had been taxed against the co-respondent; the balance was invested in the purchase of a life-annuity for the respondent, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent; and in the event of her breaking either of those conditions, to be paid to the petitioner.

THIS was a husband's petition for dissolution of marriage, and claiming damages. The cause was tried before Sir R. Phillimore by a special jury, and a verdict was found for the petitioner with 7500*l.* damages. An application was made for a new trial on the ground that the damages were excessive, and after argument before the full Court the application was refused on the petitioner consenting to reduce the damages to 5000*l.* The co-respondent having brought the 5000*l.* into the registry, a motion was made for an order for its apportionment. Several affidavits were filed, but the only material facts set out in them were that there were four children of the marriage: Frederick, aged twenty-six years; Ida, aged twenty-four; Alfred, aged twenty-three; and John Joseph, aged five; that the elder children had left their father and taken part with their mother during the litigation between them, but the youngest child remained with the father; that the petitioner was a banker's clerk with a salary of between 400*l.* and 500*l.* a year, and that the respondent had no means of support or provision for her maintenance. It was agreed that 1500*l.* should be settled on the youngest child, but the petitioner wished to be allowed to receive the balance of the 5000*l.*, and the respondent wished to have it applied towards the support of herself and of the other children.

Inderwick, Q.C., and *Bayford*, for the petitioner.
Dr Spinks, Q.C., and *Searle*, for the respondent.

Dec. 5. THE JUDGE ORDINARY. All parties ask that a sum of 1500*l.* shall be settled on the youngest child of the marriage. I direct that that sum shall be so settled on the child, the money to

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go to the father in the event of the death of the child before attaining his majority. I further direct that all the petitioner's extra costs be paid out of the damages, and that a sum of 1500*l.* be also paid to him; and I direct that the balance of the 5000*l.*, whatever it may then be, shall be applied in the purchase of an annuity for the life of the respondent, to be paid to her so long as she shall live chastely, but that in the event of her forfeiting it by reason of her not living chastely, or in the event of her ever becoming the wife of the co-respondent, then that the annuity be paid to the petitioner for his life. My reason for making this apportionment is this: It appears that the co-respondent is a married man, and it is said that since her separation from the petitioner, the respondent has been supported and visited by the co-respondent. Indeed, I am asked to come to the conclusion that their guilty intercourse has been carried on since the pronouncing of the decree in the suit. My object, then, in making the annuity payable to the respondent, so long as she lives a chaste life, is that she shall have the strongest possible motive to abstain from troubling the married life of the co-respondent and his wife. I do not impose as a condition that the respondent shall not marry again; that, perhaps, would be the best thing that could happen. But, in the event of the co-respondent's wife's dying, and his marrying the respondent, then, as she would have to be supported by him, there would be no reason for her continuing to receive this annuity, and in that event it ought to go to the petitioner. I pass over the children, save the youngest, but not because I think they might not be entitled to some share in the damages by reason of their being of full age. I do not think that would be a sufficient reason for passing them over. There might be circumstances under which I should have allowed some portion of the damages to be paid to them, but two of these three children have cast in their lot with their mother, and, in putting her in possession of this annuity, I leave it to her to apply such portion of it to their maintenance as she may think fit, and also furnish another and additional motive for her observance of the conditions which I have named.

Solicitors for petitioner: *Green, Allen, & Green.*

Solicitor for respondents: *H. Harris.*

Solicitors for co-respondents: *Travers Smith & Co.*

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March 26.

MAUDSLAY *v.* MAUDSLAY.

Dissolution of Marriage—Variation of Settlements—Power of Trustees to advance Money to Respondent—Power of the Respondent to revoke and reappoint a portion of the Trust Fund—Appointment of new Trustees.

1 P D 179
1 S D

In a suit for dissolution of marriage brought by the wife, a decree absolute having been made, application was made to the Court to vary the settlements executed on the marriage of the parties:—

Held, that the object of the Court, in varying the provisions of a settlement, should be to prevent, as far as may be just and practicable, the innocent party being damaged, in a pecuniary sense, by the decree of dissolution. It will not deprive the father of the power of exercising parental judgment and discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother.

In this case Mrs. Maudslay petitioned the Court to dissolve her marriage with the respondent, Athol Edward Maudslay, by reason of his adultery and cruelty. A decree nisi was pronounced on the 17th of March, 1875, and it was made absolute on the 9th of November, 1875. On the 21st of February, 1876, the petitioner filed a petition for the variation of the settlements made on her marriage with the respondent, to which he answered on the 13th of September, 1876. The marriage of the parties took place in 1869, and three children have been born thereof: Athol John Maudslay, aged six years; Reginald Walter Maudslay, aged five years; and George Archibald Maudslay, aged three years. The trustees of the settlement are, Charles Thomas Lucas, James Murray, Herbert Charles Maudslay, and Walter Henry Maudslay. The property brought into settlement consisted of 10,000*l.* on the part of the petitioner, an equal sum on the part of the respondent, and he also assigned to the trustees his one-eighth share of and in a moiety of the residuary estate of his father to which he is entitled in reversion expectant on the death of his mother, who is still alive. This one-eighth share is estimated at the value of 15,827*l.* 16*s.* or thereabouts. This assignment was made as security for the fulfilment of a covenant that he would pay to the trustees 10,000*l.* within six months after the death of his mother.

The trusts of the settlement are as to the 10,000*l.* brought into settlement by respondent, and the further sum payable by him on the death of his mother, that the interest thereof should be paid

to the respondent for his life, and the interest of the wife's fortune to her for life. After the death of either, to the survivor for life; after the death of the survivor as to the 10,000*l.* in reversion covenanted to be brought into settlement by the respondent, that it be held upon such trusts for the children of the marriage, or their issue, as the respondent shall appoint. As to the remaining trust funds upon such trusts for the children or their issue as the petitioner and respondent may jointly, or the survivor may appoint. In default of appointment in trust for the children equally, and in the event of no child attaining a vested interest, that the trustees shall stand possessed of the respondent's fortune after the petitioner's death for the respondent absolutely, and of the petitioner's fortune, if she survive the respondent for her absolutely, but if he shall survive her, then as she shall by will appoint, and in default of appointment for her next of kin.

The registrar to whom the petition and answer were referred, after setting out the above facts, further reported, "As to the wife's fortune, it is proposed that an order should be made to extinguish the life interest of respondent, and that the settlement with respect thereto be read as if he were now dead. It is not proposed to interfere with the life interest of the respondent in the money brought into settlement by him, nor with his sole power of appointment over the money in reversion, nor with the joint power of appointment over the 10,000*l.* in possession brought in by him. The wife is desirous, however, that his power of appointment over such last-mentioned sum in the event of his surviving her should be extinguished. There are some provisions in the settlement to which it is necessary to call attention. It is provided, that if after the decease of either husband or wife the survivor shall marry again, he or she may revoke the trusts of the settlement as to the funds brought into settlement by them respectively, and re-settle the funds to the following extent: if one child only attain a vested interest, then to the extent of three-fourths the funds; if two such children, to the extent of one-half; if three or more, to the extent of one-fourth. No child has yet attained a vested interest. The petitioner desires that this power, so far as the respondent is concerned, shall be extinguished. There are three children living, and, therefore, at present the power

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extends to one-fourth of the funds. It is submitted whether there is sufficient reason shewn for interfering with this power. There is a power to the trustees at their option to advance out of the husband's fortune in possession a sum not exceeding 5000*l.*, and a further direction to them to advance out of the husband's fortune in reversion, or concur in or enable him to raise thereout or out of the securities for the same such further sum or sums as he might require not exceeding altogether the further sum of 5000*l.* for the purpose of placing the husband in business, and to be secured by his bond. The petitioner desires that the first mentioned power shall be taken from the trustees, and that as to the second it shall be optional with the trustees to exercise it or not. With regard to this I would submit that in the first case there would seem to be no reason for interfering with the discretion of the trustees, who will protect the interest of all parties, and with regard to the second case, I submit to the Court whether the husband should be deprived of his right to call for the advance of this money, which may be absolutely necessary to set him up in business. There is also a power to the husband to revoke the trusts contained in the settlement concerning the 10,000*l.* in reversion, and to create new trusts in favour of the wife, and the issue of the said marriage, or such one or more of them to the exclusion of the rest, as he may think proper, and in the event of his surviving his wife, to absolutely revoke all trusts to the extent of one-half of such sum. The wife desires that this power may be extinguished, as it will enable the husband to take away her life interest therein. If it does give him this power, I submit that it should be varied to that extent. The settlement contains the ordinary power of appointment of new trustees. It is desired by both parties that this should be varied, and that in the case of either Charles Thomas Lucas, or James Murray, or any trustee or trustees substituted for him or them, dying or ceasing to act, the wife shall have the power of appointment, and that a similar power shall be given to the husband as to Herbert Charles Maudslay and Walter Henry Maudslay. It may be a question whether the Court has power to give such a discretion: see *Hope* v. *Hope and Erdody.* (1) The petitioner under the settlement is in receipt of 500*l.* per annum, and it is admitted that

(1) Law Rep. 3 P. & M. 226.

in addition to that she has an allowance from her father of 500*l.* per annum, making a total income of 1000*l.* per annum. She has the custody of the children. The respondent has 500*l.* per annum from the settlement, and it is not suggested he has any other means. The petitioner asks for 50*l.* per annum for each of the children. Considering that the petitioner's income is double that of the respondent, I would submit to the Court that no such order is necessary."

Jan. 16. *Inderwick, Q.C.*, and *Searle*, for the petitioner, referred to *Evered* v. *Evered and Graham.* (1)

Dr. Deane, Q.C., and *Bayford*, for the respondent.

Cur. adv. vult.

March 27. THE JUDGE ORDINARY. The marriage of the petitioner was dissolved on the ground of her husband's cruelty and adultery, and a petition for variation of the marriage settlement having been filed, it was referred to the registrar to report upon it. There are three children of the marriage, boys, aged respectively six, five, and three years. On the marriage of the parties in 1869, three sums of 10,000*l.* were brought into settlement—10,000*l.* by the wife, 10,000*l.* by the husband, and a further sum of 10,000*l.*, part of 15,827*l.*, to which the husband will become entitled on his mother's death.

The trusts declared as to these several sums were (so far as it is necessary for the present purpose to state them) as follows: As to the 10,000*l.* brought into settlement by the wife, the income is to be paid to her for life, and in the event of the respondent surviving her, to him for life; and after the death of the survivor, upon such trusts for the children, grandchildren, or other issue of the marriage as the petitioner and the respondent jointly, or the survivor, should appoint, and in default of appointment, for the children equally.

As to the 10,000*l.* in possession brought into settlement by the respondent, similar trusts are declared, with the exception that the first life estate is given to the respondent. As to the 10,000*l.* in reversion brought into settlement by the respondent, the income

(1) 43 L. J. (P. & M.) 86.

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is to be paid to him for life, then to the petitioner, if she survives him, and after the death of the survivor upon such trusts for the children or their issue as the respondent shall appoint.

I am of opinion that the settlement should be varied as to the 10,000*l.* brought into settlement by the wife, by extinguishing absolutely the interest and powers of the respondent with regard to it, and by authorizing the petitioner to enjoy and deal with it as though the respondent were now dead.

As to the 10,000*l.* in possession brought into settlement by the respondent, I see no reason to make any variation. The petitioner asks that the respondent's power of appointment as to this sum amongst the children in the event of his surviving her should be extinguished; but I do not think that I ought to deprive him of the power of exercising parental judgment and discrimination with regard to his boys. The unhappy events which have led to the dissolution of the marriage of the parents are not calculated to bias his feelings with reference to the children, and I do not think it expedient that the relations of the children with their father should be changed to any greater extent than is inevitable from their remaining in the custody of their mother.

It is further provided, that if, after the decease of either husband or wife, the survivor shall marry again, he or she may revoke the trusts of the settlement as to the funds brought into settlement by them respectively, and resettle such funds in certain proportions according to the number of children who may attain a vested interest. The petitioner desires that this power, so far as the respondent is concerned, shall be extinguished. As I am of opinion that by the terms of the settlement the respondent could only exercise this power in the event of his outliving the petitioner and marrying again after her death, I do not see any reason why he should be deprived of it, as the dissolution of the marriage does not enable him to exercise the power in any greater degree to the prejudice of the children of that marriage than if it had continued until the death of the petitioner.

A power is given to the trustees at their option to advance out of the husband's fortune in possession a sum not exceeding 5000*l.* for the purpose of placing or advancing the husband in business. I am asked to extinguish this power, but I am of opinion that I

ought not to deprive the trustees of the right in their discretion to make this advance. They would, no doubt, exercise their power with a due regard to the security of the money to be advanced, and it might very probably be for the interest of the three children of the marriage, who are boys, that the respondent should engage in business. It is not to be assumed, and, as I have already said, I see no reason to suppose that his interest in these children will henceforth cease, and he may be willing, and it may be thought desirable that they or some of them should hereafter be associated with him in some business in which capital may be required.

As to 5000*l.* of the 10,000*l.* in reversion brought into settlement by the respondent, the trustees are required to advance it at his request, for the purpose of placing him in business. I am asked to deprive the respondent of the right to call upon the trustees to advance this sum. I think, however, that I ought not to do so. Culpable as the conduct of the respondent has been, my functions are not to punish him for it, but merely to prevent, as far as I may think just and practicable, the petitioner being damaged in a pecuniary sense by the dissolution of the marriage, which that conduct has occasioned; but her position and prospects with reference to this 5000*l.* are in no way altered by the dissolution of the marriage, and it would be a useless hardship upon the respondent to deprive him of the means of engaging in business with this money.

There is a further provision that the respondent shall have power, whether he survive the petitioner or not, by deed or will, to revoke or alter the trusts with reference to the 10,000*l.* in reversion, and to re-settle the whole or part in favour of the petitioner, and the children, grandchildren, or other issue of the marriage, or such one or more of them to the exclusion of the rest, as he may think proper. If the meaning of this clause is that the respondent may take from the petitioner her life interest in the 10,000*l.* in the event of her surviving him, I think he ought to be deprived of such a power. I have already expressed my opinion that the respondent's power of appointment over the funds he brought into settlement ought not to be interfered with with reference to his children, because the events which have happened

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have no natural bearing on the exercise of his parental regard for his children; but the case is different with respect to his wife. The stipulations of the marriage settlement were consented to by her on the supposition that the marriage would continue until the death of herself or her husband, and therefore that this power of revocation would be exercised, if exercised at all, under the natural influences resulting from the relation of husband and wife. But the husband has, by his wrongful acts, caused that relation to be put an end to. It has been proved that he has, without justification, withdrawn his affections from his wife, and that he has not only been unfaithful to her, but treated her with unkindness and cruelty. The conditions under which the wife was entitled to expect that the power of depriving her of any interest in those funds would be exercised have been reversed by the misconduct of her husband. In the place of love and union until death, he has brought discord and life-long separation between them. In these altered circumstances he can be no longer trusted to put his powers in action against his former wife with fairness and judgment, and I therefore think it will be proper to extinguish this power of revocation and re-appointment so as in any way to deprive the petitioner of the right to an interest for life in the 10,000*l.* reversion in the event of her surviving him. In all other respects I leave the respondent's power of dealing with this fund unaffected, including the power, in the event of his surviving the petitioner, of revoking the trusts as to one half, and re-settling it as he may think proper.

Both parties desire that the provisions of the settlement as to the appointment of new trustees should be altered, and I accordingly vary them by directing that in the case of Charles Thomas Lucas and James Murray, or either of them, or any trustee or trustees substituted for them or him dying or ceasing to act, the petitioner shall have the power of appointment, and that a similar power be given to the respondent in the event of Herbert Charles Maudslay and Walter Henry Maudslay, or either of them, or any trustee or trustees appointed in the place of either of them dying or ceasing to act. It is further asked by the petitioner that an allowance of 50*l.* be made by the respondent for each of the three children. I think that as their incomes are at present equal, and

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the petitioner has to maintain the children, this is a reasonable amount for the respondent to pay towards their support and maintenance, and I direct that this sum be paid to the petitioner until further order.

I have disposed of the several matters to which my attention has been called. If further difficulties in carrying out my directions should arise, either party may apply to me in chambers.

Solicitor for petitioner: *J. B. Batten.*

Solicitors for respondent: *Tattershall & Tattershall.*

FENDALL, otherwise GOLDSMID *v.* GOLDSMID. *July* 24.

Suit for Nullity—Undue Publication of Banns—Petitioner previously Divorced—Proper Name.

The petitioner having obtained a decree dissolving her marriage with the respondent, subsequently re-married him. This second marriage was celebrated after publication of banns, in which the petitioner was described by her name of marriage, she having in the interval between the decree dissolving her first marriage and the celebration of the second usually passed by her maiden name. On an application to annul such marriage by reason of an undue publication of banns:—

Held, that a name acquired by marriage can only be superseded by a reputed name in cases where the name had been so far acquired by repute as to obliterate the name acquired by marriage.

Alice Henrietta Anna Goldsmid, on the 27th of September, 1875, petitioned the Court as follows:—

1. On the 6th of October, 1866, your petitioner (then A. H. A. Fendall, spinster) was married to William Holland Goldsmid in the British Consul's Office at Calais, in France. 2. On the 31st of March, 1869 (this date was erroneous, the decree nisi having been made on the 24th of March, 1870, and the decree absolute on the 15th of November, 1870), the said marriage was dissolved by a decree of this Court, on the ground of the adultery, cruelty, and desertion of the said W. H. Goldsmid. 3. On the 29th of April, 1872, a ceremony of marriage was celebrated between your petitioner and the said W. H. Goldsmid, at the parish church of St. Botolph, Aldgate, Middlesex. 4. That the banns for the said pretended marriage, celebrated as aforesaid on the 29th of April,

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1872, were published in the name of Alice Henriet ta Anna Goldsmid, whereas your petitioner had ever since the dissolution of her first marriage with the said W. H. Goldsmid been known by the name of Alice Henrietta Anna Fendall, and your petitioner and the said W. H. Goldsmid were falsely described as widow and widower, and your petitioner and the said W. H. Goldsmid knowingly and wilfully intermarried without due publication of banns.

The petitioner prayed for a decree that the ceremony of marriage celebrated on the 29th of April, 1872, between the petitioner and respondent, is null and void, and that she is free from all bond of marriage with the said W. H. Goldsmid, and further for a decree that the respondent shall pay the costs of and incident to the petition.

On the 12th of November, 1875, this petition, with the citation, was served upon the respondent at Cape Town, Cape of Good Hope, but he entered no appearance thereto. At the hearing it appeared that the date of the decree dissolving the previous marriage had been erroneously stated in the petition, whereupon

Searle, for the petiti oner, asked leave to amend it.

'THE JUDGE ORDINARY.' I have no objection to the amendment being made, but the petition must be re-served upon the respondent. It will be for counsel to consider how far it will be advisable to do so, when I state that I am of opinion that marriage confers a name upon a woman, which becomes her actual name, and that she can only obtain another by reputation. The circumstances must be very exceptional to render a marriage celebrated in the actual names of the parties invalid. It could only be where the woman has so far obtained another name by repute as to obliterate the original name.

Searle thereupon asked that the petition should be at once dismissed, which was done.

Solicitor: *E. Johnson.*

MANSEL *v.* THE ATTORNEY GENERAL.

1877
July 31.

Legitimacy Declaration Act—Petitioner claiming Real Estate in England—Jurisdiction.

4 PD 232

Under the Legitimacy Declaration Act (21 & 22 Vict. c. 93), the Court cannot determine whether or not the petitioner is heir-at-law to another person, and allegations to that effect in the body of the petition or in the prayer thereto are inadmissible.

Where the proceedings are instituted by one who claims real estate in England, circumstances may be stated in the petition to support such claim.

Richard Mansel Mansel, of Newbury, Buckinghamshire, petitioned the Court, under the Legitimacy Declaration Act, as follows:—

1. On the 7th of June, 1847, Courtenay Philipps, afterwards Courtenay Mansel, formerly a major in her Majesty's 15th Hussars, being then a bachelor, and of full age, and the son of R. Philipps, deceased, was lawfully married to Eliza Sidney, a spinster, and of full age, and the daughter of the Reverend John Sidney, at St. Paul's Church, in the parish of Liverpool, Lancashire. 2. That after their marriage the said Courtenay Philipps, afterwards Courtenay Mansel, and the said Eliza Philipps, lived and cohabited together as man and wife. 3, 4. That there was issue born of the marriage, as follows: Courtenay Philipps, afterwards Courtenay Mansel the younger, born on the 4th of May, 1848, and who died on the 5th of January, 1874, a bachelor; Harriet Philipps, now Harriet Mansel, born on the 13th of August, 1849, and Richard Mansel Philipps, now Richard Mansel Mansel, born on the 2nd of December, 1850 (the petitioner). 5. Your petitioner's father assumed the surname of Mansel in substitution for the surname of Philipps in the year 1866, and died on the 9th of September, 1875. 6. Under the circumstances aforesaid, your petitioner is the legitimate son and heir-at-law of the said Courtenay Mansel the elder. 7. Your petitioner's father, by his last will and testament, dated the 22nd of March, 1875, devised all his manors, messuages, farms, lands, tenements and hereditaments in the counties of Glamorgan, Carmarthen, Surrey, and elsewhere, of and to which he should at his death be seized or entitled in

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possession, remainder, or reversion, subject to a certain annuity, and to certain charges, to the use of your petitioner for life, with remainder for the use of the first and every other son of your petitioner successively, according to their respective seniorities, in tail male and subject thereto, to the use of all the daughters of the testator, as tenants in common in tail, with cross remainders between them, and subject thereto to the use of an only daughter in tail, and subject thereto to the use of the testator's own right heirs. 8. On the 9th of March, 1877, the President of the Probate, Divorce, and Admiralty Division of this Court, after the trial before the said president and a special jury as to the validity of the said will, and after a verdict had been returned in favour of the said will, pronounced for the validity of the same, and decreed probate thereof, and such probate is binding on the real estate disposed of by the said will. 9. By the aforesaid provisions of the said will your petitioner, in the event of the stipulations contained in the said will in favour of his issue male, lawfully begotten, and of the said daughters of the testator failing to take effect, will be entitled to the ultimate remainder over of the said real estates, as the heir-at-law of the said Courtenay Mansel the elder. 10. Edward Berkeley Mansel, of Brandon Hall, Ipswich, Suffolk, late a captain in her Majesty's 6th Dragoon Guards, and who is a son of the said Courtenay Mansel, the father, by the said Eliza Mansel (who before her said marriage passed for some years as Eliza Knighton), having been born out of wedlock, alleges that he is the eldest legitimate son and heir-at-law of your petitioner's said father, the said Courtenay Mansel the elder. 11. Your petitioner is legally domiciled in England. Your petitioner therefore prays that the president will be pleased to make a decree declaring, 1, that the said Courtenay Philipps, afterwards Courtenay Mansel the elder, and Eliza, his wife, were on the 7th of June, 1847, lawfully married; 2, that your petitioner is the lawful son of the said Courtenay Philipps, afterwards Courtenay Mansel (the elder), and Eliza, his wife, and is the lawful heir-at-law of the said Courtenay Mansel the elder; 3, that your petitioner is a natural born subject of the Queen.

July 17. *A. Hardy*, on behalf of the Attorney General, moved

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the Court to direct that the words "heir-at-law" be struck out of the 6th paragraph of the petition, and of the 2nd paragraph of the prayer, and that the 7th, 8th, 9th, and 10th paragraphs of the petition be omitted altogether. The Court can only inquire into the legitimacy or illegitimacy of the petitioner himself, and not of other persons; nor can it find who is the heir-at-law of any person. The 7th, 8th, and 9th paragraphs are irrelevant, and if traversed would lead to unnecessary issues. [He referred to *Frederick* v. *Attorney General.* (1)].

Dr. Tristram, for the petitioner, admitted that the words "heir-at-law" must be struck out; but with regard to the 7th, 8th, and 9th paragraphs, he contended that they were properly inserted, because the petitioner is proceeding on the ground that he has a claim to real estate in England (21 & 22 Vict. c. 93, s. 1), and the facts stated in those paragraphs shew why he makes that claim.

THE JUDGE ORDINARY. I agree that it is improper that a petition under this Act should introduce any matter or claim any benefit other than the Court is authorized by it to investigate or grant. The statement, therefore, in the 6th paragraph and in the prayer, that the petitioner is heir-at-law to his father must be omitted, and also paragraph 10, which alleges the illegitimacy of another person. As regards the three other paragraphs, however, objected to, I am not satisfied that it is improper to state in the petition the circumstances under which the petitioner is a claimant of real estate, and I will consider whether they go further than that.

Cur. adv. vult.

July 31. THE JUDGE ORDINARY. This is a petition under the Legitimacy Declaration Act, in which Richard Mansel Mansel prays the Court to decree that he is the lawful son of Courtenay Philipps, afterwards Courtenay Mansel the elder, and Eliza his wife, and is the lawful heir of the said Courtenay Mansel the elder, and that he is a natural born subject of the Queen. On the last occasion when the matter was argued before me, I

(1) Law Rep. 3 P. & D. 196.

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expressed an opinion that that part of the prayer which asked the Court to decree that the petitioner is heir-at-law to Courtenay Mansel should be struck out, by reason that the Legitimacy Declaration Act does not give the Court jurisdiction to declare a person to be the lawful heir of another, but only that he is legitimate. I also directed that the statement in the body of the petition, that the petitioner is the heir-at-law of Courtenay Mansel should be struck out for the same reason. Again, the 10th paragraph states that Edward Berkeley Mansel, of Brandon Hall, &c., a son of the said Courtenay Mansel the father by the said Eliza Mansel having been born out of wedlock, the petitioner is the eldest legitimate son and heir-at-law of the petitioner's said father, the said Courtenay Mansel the elder. I directed this paragraph to be omitted because, as I stated, it is not within the jurisdiction of the Court to declare some other person than the petitioner to be illegitimate. As regards the 7th, 8th, and 9th paragraphs which I was also asked to strike out, there was some hesitation on my part, because I was not prepared to hold that the facts therein stated would be inadmissible if introduced for any legal object. These paragraphs set out part of the petitioner's father's will, and the result of a suit in the Court of Probate, which was tried before a special jury, and in which the validity of the will was established, and further, that the petitioner under that will in certain contingencies obtained certain rights as heir-at-law. I think, however, that these paragraphs are introductory to the prayer that the petitioner shall be declared heir-at-law, which is not within the jurisdiction of the Court, they will, therefore, be struck out.

Solicitors for petitioner: *Nelson, Son, & Hastings.*
Solicitor for Attorney General: *E. L. Rowcliffe.*

ROBINSON AND RUSHTON *v.* CLARKE AND STAINTON. 1877

May 1.

Testamentary Suit—Compromise—Probate of Documents not inconsistent with one another.

In a testamentary suit, where the parties have come to an arrangement under the terms of which the Court is applied to to grant probate of two testamentary instruments, it will do so provided such documents are not entirely inconsistent with one another.

Samuel Stainton Brown, late of Lewisham, Kent, surgeon, died on the 12th of June, 1876. On the 8th of June, 1876, he duly executed a paper called "Instructions for a will," in the handwriting of the plaintiff, Frederick Thomas Rushton, who is a solicitor. By this he devised, gave, bequeathed, and appointed the whole of his property in possession or reversion, or over which he had any power of disposition, to the plaintiffs, Raisbeck Welford Robinson and Frederick Thomas Rushton, upon trust to convert the whole of such property as should not consist of ready money into cash; and after payment of debts, funeral, and testamentary expenses to stand possessed of the residue upon trust to invest the same as therein mentioned, and out of the income arising from such investments to pay 50*l.* per annum to his servant, Elizabeth Towcester Smith; 250*l.* to Abraham Christmas, his gardener; and 250*l.* to the plaintiffs in trust for George Gossett, a boy in his employ. He gave a microscope, diamond studs, and some books to Dr. Roper; a gun-case and four pictures to John Clamcoats; a legacy of 19*l.* 19*s.* to Dr. Wilkes; all the interest he took under the will of his aunt, Mrs. Hadley, to the plaintiff Robinson; and a bust and an oil painting to his sister, the defendant, Mrs. Clarke. The residue of his property of every nature and kind soever he left to the plaintiffs, and he appointed them executors, with power to make the usual professional charges, they being both solicitors. After the gift of the residue there was a blank left, which it was suggested by the defendants the testator intended to be filled up with the names of some cestui que trust.

On the following day, the 9th of June, 1876, the testator executed a more formal will. By this he left 250*l.* to Abraham Christmas; his diamond studs, microscope, and books, not exceed-

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ing one hundred volumes, to Arthur Roper, described as his friend; the marble bust of their mother, and the large portrait in oil of their father to his sister, Mrs. Clarke; his gun-case and appendages and any four pictures, other than the portrait of his father, to his friend, John Clamcoats; 19*l.* 19*s.* to Dr. Wilkes; and to the plaintiff, Robinson, all the shares, moneys, hereditaments, stocks, funds, and all other interests which were bequeathed, devised, or given to the testator by the will of his late aunt, Mrs. Ann Hadley; also a cottage at Bangor given to him by his late aunt shortly before her death. The residue of his real estate he gave to the plaintiffs upon trust for sale at their discretion, with directions that they should out of the purchase-money pay his funeral and testamentary expenses, debts, and legacies, and appropriate a fund sufficient to produce the annual sum of 50*l.*, which he directs shall be paid to his servant, E. T. Smith, with a claim against anticipation which was not in the instructions. The plaintiffs are appointed executors, and are to be allowed their professional charges. There was a clause revoking all former wills, but the general residue was not disposed of by this will.

The plaintiffs propounded the two documents of the 8th and 9th of June, 1876, as together containing the last will and testament of the deceased, and the defendants pleaded that such documents were respectively not duly executed, and that the deceased was not of sound mind on the 8th and 9th of June. The cause came on for hearing before Sir J. Hannen, President, and a special jury, on the 17th of March, 1877, when by consent a verdict was taken establishing the due execution of the two papers of the 8th and 9th of June, 1876, and the terms of compromise agreed upon between the parties were ordered to be filed. Upon application by the counsel for the plaintiffs that a decree should be pronounced in favour of the force and validity of the two testamentary papers, as together containing the last will and testament of the deceased, leave was granted to renew the application on motion.

March 27. *Dr. Deane, Q.C.* (*Dr. Tristram* and *Searle*, with him), moved accordingly. All the parties are anxious that, if possible, both these documents shall be admitted to probate. The clause of revocation only applies to wills inconsistent with

the last. He referred to *Juler* v. *Juler* (1); *Shepherd* v. *Nottidge* (2); *Harrison* v. *Harrison* (3); *Lemage* v. *Goodban* (4); *In the Goods of Petchell.* (5)

Harrison, Q.C., and *Pritchard*, for the defendants.

Cur. adv. vult.

May 1. SIR JAMES HANNEN (President). In this case there were two executed papers. The first, called "Instructions for will," was executed on the 8th of June, 1876. By this the deceased, after a devise of all his property in possession or reversion, to the plaintiffs, upon trust to pay debts, funeral, and testamentary expenses, and certain legacies and annuities therein mentioned, leaves the residue to the plaintiffs. On the following day the deceased executed a more formal document, in which the residuary clause was omitted. The questions in issue in the cause came on for hearing before me and a special jury, when by consent of all parties a verdict was taken which established the validity of the two papers. I was informed that the parties had come to an arrangement, but the terms of the arrangement I did not then know. I was asked to decree probate of these two documents, that is of the instructions dated the 8th of June, and of the more formal will dated the 9th of June, as together containing the will of the deceased. I hesitated, because I found that the will, dated the 9th of June, contained a clause revoking all former wills. On reflection, I think that as the parties have agreed that the two documents shall be admitted to probate, I ought to accede to their wishes. I am in this position, I think I ought not to refuse to carry out the terms agreed upon, unless I am prepared to hold that under no possible circumstances could the first document be taken as consistent with the last. I am not prepared to say that. I think there may be circumstances in which the two would operate together. I content myself, therefore, by saying that I assent to this motion.

Solicitors for plaintiffs: *Rooke & Son.*

Solicitors for defendants: *Lewin & Co.*

(1) 29 Beav. 34; 30 L. J. (Ch.) 142.
(2) 2 J. & H. 766.
(3) 2 H. & M. 237; 33 L. J. (Ch.) 647.
(4) Law Rep. 1 P. & M. 57.
(5) Law Rep. 3 P. & M. 153.

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June 12.

IN THE GOODS OF BRACKENBURY.

Administration to Creditor—Bond to Pay pro ratâ not applied for—Practice—Future Practice.

Where administration has been granted to a creditor and no application was made at the time the grant issued that the administrator should pay the debts rateably, the Court will not revoke such grant subsequently in order to compel such administrator to give up his right to retain assets sufficient to repay himself his own debt in full.

For the future, a creditor on taking out administration must, in all cases if required by the Court, enter into a bond conditional to administer the estate rateably amongst the creditors of the deceased.

LANGLEY JOSEPH BRACKENBURY, of Alford, Lincolnshire, solicitor, died on the 20th of May, 1875. By his will, dated the 9th of November, 1871, he left all his property to his wife Mary Elizabeth Brackenbury, and appointed her sole executrix. She renounced probate, and on the 28th of June, 1875, administration with the will annexed was granted to Charles John Allen, as a creditor of the deceased, but no application was at that time made to the Court by any other creditor to order the administrator to give a bond conditional to divide the estate rateably amongst all the creditors.

On the 3rd of June, 1875, proceedings were instituted in the Court of Chancery by Frederick Cook, on behalf of himself and other creditors of the deceased, for the administration of the estate under the direction of that Court. The whole property of the deceased amounted to 244*l.*, and the debts exceeded 20,000*l.* Mr. Allen, the administrator, claimed out of the property to retain a sum of 149*l.* as a debt due to himself and partners, Messrs. Norris, Allen, & Carter, in priority to all other debts due by the deceased.

On the 1st of May, 1877, the Master of the Rolls made an order in the administration suit allowing, under the circumstances of the case, the administrator to retain the debt due by the deceased to his firm in preference to the claims of the other creditors. The Reverend Arthur White was a creditor of the deceased for the sum of 89*l.* in respect of certain trust funds which were intrusted to deceased for investment, and by him misappropriated.

Gardiner, on his behalf, applied to the Court to order Mr.

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Allen to give a bond conditional to administer the estate rateably amongst all the creditors of the deceased, or if he refuse to do so, to revoke the administration already granted to Mr. Allen, and to re-issue it to the applicant or some other creditor willing to give such a bond.

Searle, for the adminitrator. The application is too late. If it had been made in the first instance, according to the ordinary practice, the Court would have refused to grant the administration to Mr. Allen unless he consented to enter into such a bond. By the laches of the creditors such an application was not made, and the Court cannot now revoke a grant issued properly and without fraud.

SIR J. HANNEN (President.) If I could regard what has been done as improperly done, I should be disposed to exercise a power I take it I possess and to revoke the administration, but having regard to the fact that no instance can be shewn in which a similar application has been successful, I cannot accede to the application. It is impossible to say that this grant was made out of the ordinary course, the creditor merely availed himself of a right which the regular practice of the Court allows him. He has the benefit of his greater diligence over the other creditors, and I ought not to deprive him of it simply because he thereby obtains a certain advantage which the law gives him; I cannot deprive him of it because the other creditors have not done what, by the practice of this Court, they might have done to prevent the present administrator paying himself his debt in preference to the others.

The creditor against whom I decide this case may have the satisfaction of knowing that by reason of the facts brought to my attention by him, I shall for the future not grant administration to a creditor (whether the other creditors are present or not to make objection) unless he consents to pay all the debts pro ratâ if so required by the Court. The costs of this application must be paid out of the estate.

Solicitors for applicant: *Travers Smith & Co.*
Solicitors for Mr. Allen: *Norris, Allen, & Carter.*

IN THE GOODS OF ROSS.

1877
July 10.

Administrator abroad—Additional Duty Payable—Bond executed by another Person.

A, having taken out administration to the goods of the deceased, went abroad. Subsequently under an order of the Court of Chancery, a considerable sum became payable to the estate of the deceased, and of his brother and sister, who are also deceased. The order could not be passed and entered until the additional duty on these estates had been paid. In the absence of the administrator, who was in Japan, the Court allowed another person to file an affidavit as to the increase of property, and to execute the bond to cover the increased duty (in the place of the administrator), with two sureties, on the understanding that, as soon as possible, the administrator should execute a similar bond.

ROBERT ROSS, late of Kingston, Jamaica, died on the 9th of February, 1850, having made a will, in which he did not name an executor, but appointed Robert Phillips Ross universal legatee. On the 11th of October, 1875, administration, with this will annexed, was granted to Robert Phillips Ross, who swore that the goods of the deceased did not exceed in value the sum of 200*l.*, and paid a duty of 2*l.* In a suit entitled the *Equitable Reversionary Society* v. *Robinson*, in the Chancery Division, which was instituted to administer the estate of Major George Ross, of Alexander Square, Brompton, deceased, on the 18th of May, 1877, an order was made by which it was declared that, under the will of the said George Ross, bearing date the 3rd of October, 1835, the representatives of the said deceased Robert Ross, and of his brother, William Ross, and of his sister, Margaret Ross, both deceased, were severally entitled to one-sixth part of the residuary estate of the said George Ross, and such sixth part was found to be of the value of 2140*l.* 14*s.* 10*d.* The order so made could not be passed and entered until the additional duty amounting to 48*l.* had been paid upon these shares. Robert Phillips Ross is now in Japan; the applicant, Frederick William Hill, is the administrator with the respective wills annexed of William Ross and Margaret Ross, and as such is entitled to one-third the residuary estate of George Ross. The deceased Robert Ross did not die possessed of any other property beyond what is now being administered in the Chancery Division in the above suit.

G. Browne applied to the Court to allow Mr. Hill to make the necessary affidavit in lieu of the administrator, as to the increased

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amount of the estate, so that the letter of administration might be stamped with the additional duty, and also that he might, in the place of the administrator, execute a bond with two sureties to cover the additional property. As the order cannot be entered until this additional security is given the estates represented by Mr. Hill will be injuriously affected by delay. He referred to *In the Goods of Stewart Sutherland.* (1)

SIR J. HANNEN (President). I think I ought to grant this application. It seems that the estate of the deceased has turned out to be of greater value than was anticipated when the first bond was given. The Act of Parliament (55 Geo. 3, c. 184. s. 42) imposes upon this Court in such cases the duty of taking a fresh bond to cover the amount which ought to have been included originally. "In cases of letters of administration where too little stamp duty shall have been paid at first, the commissioners of stamps shall not cause the same to be stamped until the administrator shall have given such security to the judge of the Probate Court, by whom the letters of administration shall have been granted, as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained." The question is, Can the Court allow such bond to be given by some other person than the one primarily liable to give such bond, that is by the administrator? It does not seem to me that in this respect my power is in any way limited by the statute; and from the case cited *In the Goods of Stewart Sutherland* (1), it is clear that there are cases in which the judge of this Court has allowed some one, other than the original administrator, to execute the bond under the circumstances, for instance, that it is impossible for the administrator to do so, or where there is a pressing necessity that it should be done by some one else. Here the latter is the ground of the application. There is a necessity that the additional duty should be paid at once. The applicant is undoubtedly a proper person to do what is necessary, and I will allow him to do so, but it must be understood that the administrator himself must execute a similar bond as soon as possible.

Solicitor: *E. H. Barlee.*

(1) 4 Sw. & Tr. 189.

1877
May 12.

[APPEAL FROM THE ARCHES COURT OF CANTERBURY.]

THE REV. C. T. RIDSDALE, APPELLANT; WILLIAM CLIFTON AND OTHERS, RESPONDENTS.*

Public Worship Regulation Act, 1874—*Vestments—Position of the Minister whilst saying the Prayer of Consecration—Wafer Bread—Illegality of Crucifix—*1 *Eliz. c.* 2, *s.* 25, *and Ornaments Rubric of* 1662.

4 PD 99.
4 QBD 703.
5 PD 135.

The appellant was declared by an order of the judge of the Arches Court of Canterbury to have offended against the laws ecclesiastical, in respect of the four following matters:—

(1.) The wearing during the service of the Holy Communion of vestments known as an alb and a chasuble.

(2.) The saying the prayer of consecration in the service of the Holy Communion while standing at the middle of the west side of the communion table, in such wise that the people could not see the appellant break the bread or take the cup into his hand.

(3.) The use in the service of the Holy Communion of wafer bread or wafers, to wit bread or flour made in the form of circular wafers, instead of bread such as is usual to be eaten.

(4.) The placing and unlawfully retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave:—

Held, upon appeal to the Judicial Committee, with regard to the first charge, that the judgment of the Court below must be affirmed.

Hebbert v. *Purchas* (Law Rep. 3 P. C. 605) approved.

1 Eliz. c. 2, s. 25, must be read together with the order made thereunder by the Advertisements of the Queen in 1566, and the law so understood acted upon and enforced from 1566 to 1662 (excepting a brief interval) cannot be repealed without a distinct and repealing enactment or an enactment inconsistent and irreconcilable therewith. The Rubric Note of 1662 could not and did not purport to repeal the law and all that had been done under it, while the Act of 1662, 13 & 14 Car. 2, c. 4, s. 24, expressly confirms the Act of 1 Eliz. c. 2; nor is the rubric inconsistent with s. 25 of the latter Act read as if the order made thereunder had been inserted therein.

Held, with regard to the second charge, that a penal charge was not established against the appellant merely by proof that he stood while saying the prayer of consecration at the west side of the communion table, without further evidence that the people could not see him break the bread or take the cup into his hand.

The minister during the prayer of consecration should so stand that he may in

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* *Present*:—THE LORD CHANCELLOR, LORD SELBORNE, SIR JAMES W. COLVILE, THE LORD CHIEF BARON, SIR ROBERT PHILLIMORE, LORD JUSTICE JAMES, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR BALIOL BRETT, and SIR RICHARD AMPHLETT. Episcopal Assessors: THE ARCHBISHOP OF CANTERBURY, THE BISHOP OF CHICHESTER, THE BISHOP OF ST. ASAPH, THE BISHOP OF ELY, and THE BISHOP OF ST. DAVID'S.

good faith enable the communicants present, or the bulk of them, being properly placed to see if they wish it the breaking of the bread and the performance of other manual acts mentioned in the rubric. The rule laid down in *Hebbert* v. *Purchas* (Law Rep. 3 P. C. 605), that he should stand at the north side of the table looking to the south explained and approved.

Held, with regard to the third charge, that if it had been averred and proved that the wafer, properly so called, had been used by the appellant, it would have been illegal; but that upon averment and proof to the effect that "bread made in the form of circular wafers instead of bread such as is usual to be eaten," affecting the shape and not the composition of the substance employed, the appellant was entitled to the benefit of the ambiguity in the form of the charge.

Held, with regard to the fourth charge, that in the absence of a proper faculty the crucifix was unlawfully set up and retained. No such faculty ought to be granted and the crucifix was ordered to be removed.

Phillpotts v. *Boyd* (Law Rep. 6 P. C. 435) approved.

APPEAL from part of a judgment or decree pronounced by Lord Penzance as official principal of the Arches Court of Canterbury (February 3, 1876). That judgment, together with the evidence and pleadings in the case, is reported in Law Reports, 1 P. D. 316.

The four points decided in this appeal are stated in their Lordships' judgment and in the above head-note.

Jan. 22, 23, 30, 31; Feb. 1. *Sir James Stephen, Q.C.*, *Arthur Charles*, *Jeune*, and *Dr. Phillimore*, for the appellant.

Dr. Stephens, Q.C., and *Benjamin Shaw*, for the respondents.

Sir James Stephen, Q.C. *Hebbert* v. *Purchas* (1) is no doubt directly in point upon the first three questions raised in this appeal. It is, however, competent to the appellant to argue that the judgment in that case was erroneous, because first, it is, as pointed out by Lord Penzance, inconsistent with *Liddell* v. *Westerton* (2) and *Martin* v. *Mackonochie* (3); and in *Fenton* v. *Hampton* (4), the Privy Council treated *Kelley* v. *Caron* (5) as of greater authority than an earlier decision of *Beaumont* v. *Barrett* (6), with which it was inconsistent, and which it had practically overruled; secondly, *Hebbert* v. *Purchas* (1) was both in the Arches Court and on appeal heard ex parte.

[THE LORD CHANCELLOR. Their Lordships think that you

(1) Law Rep. 3 P. C. 605.
(2) Moore's Special Report, p. 159.
(3) Law Rep. 2 P. C. 365.
(4) 11 Moo. P. C. 347.
(5) 4 Moo. P. C. 63.
(6) 1 Moo. P. C. 59.

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may pursue your argument, and they will consider how far this case comes under previous decisions binding upon this Court.]

First as to the legality of the particular vestments. This question turns on the true meaning of the Ornaments Rubric, which is one item in the schedule of the Act of Uniformity of 1662, containing the Book of Common Prayer, and admittedly directs that the vestments used under the First Prayer Book of Edward VI. "shall be retained and be in use." In *Hebbert* v. *Purchas* (1) it was held that the Prayer Book, as qualified by the Advertisements of Queen Elizabeth and the Canons of 1604, is to be taken as the rule as to what vestments are to be used. That view involves four propositions, the contrary of which it is now sought to establish. It is contended (a) that the Advertisements had not the force of law, but were a mere administrative Act, done by the bishops, the Queen expressly withholding her authority for reasons still on record; and that they do not condemn the use of vestments now in question, but were directed against those who were disposed to use them improperly; (b) the Advertisements were not the cause of the destruction of vestments, as stated in *Hebbert* v. *Purchas* (1); (c) the Prayer Book of 1604 was in no sense based upon the Canons of 1604, but proceeded from an entirely different source; (d) the Rubric of 1662 was not settled advisedly in reference to an objection made by the Puritans at the Conference of Savoy, with a view to prevent it reviving the vestments of Edward VI.'s First Prayer Book.

As to (1) the history of the legislation is important. 2 & 3 Edw. 6, c. 1, prescribed the First Prayer Book of the King (1549), containing an Ornaments Rubric which the second Prayer Book (1552) omitted. The Mass was restored in 1553, and in 1558–9 the 1 Eliz. c. 2, re-established the Second Prayer Book of Edward VI. and the Ornaments Rubric of 1549. The Injunctions of 1559 (see Card. Doc. Ann. vol. i. p. 210), have not the force of law, this was held with respect to similar injunctions in *Phillpotts* v. *Boyd*. (2) See their title and general contents, especially Nos. 29, 30, and 46 and 51. The Interpretations of the Injunctions (1561), which forbade vestments, are still further removed from being law, though issued by the Queen. See with regard to them Strype's

(1) Law Rep. 3 P. C. 605. (2) Law Rep. 6 P. C. 435.

Annals, vol. i. p. 213 (marginal, p. 318), and Strype's Parker, vol. i. (marginal, p. 92), Card. Doc. Ann. 237; shewing that they had only episcopal authority. In 1559–1562 came a Puritan reaction: see mandatory letter of the Queen (Card. Doc. Ann. vol. i. p. 294), which shews how further order was taken under the proviso in the Act of Uniformity, when such was the intention. Then came the Synod of 1562, and Strype's Ann. vol. i. pt. 1, c. 27 (marginal), pp. 315–317, 335, 336, 337, shew that at that time the legality of vestments was not considered to have been affected by either the injunctions or their interpretations; but that they were obligatory.

As to (2), the Advertisements were not issued in 1564, as supposed in *Hebbert* v. *Purchas* (1), but in May, 1566. The destruction of vestments took place in a series of years, from 1552 to 1566: see Peacock's Inventories, which were taken between the 4th of March, 1565, and the 26th of May, 1566. They shew that ornaments were destroyed prior to the publication of the Advertisements. These Advertisements were nothing more than orders issued by the Ecclesiastical Commissioners, not acting under the Queen's authority, but after the Queen, having been solicited to authorize the Advertisements, had refused to do so. This appears by a series of letters between the Queen, Archbishop Parker, and Secretary Cecil: viz., Queen to Parker, dated the 25th of January, 1564–5, Parker, Corresp. p. 223; Parker to Grindal, ibid. p. 227; see also Cecil's Manuscripts, Strype's Parker, vol. i. p. 152; Parker to Cecil (March 3, 1564–5), Parker, Corresp. p. 233; ditto (8 March, 1564–5), ibid. 234; ditto (24 March, 1564–5), ibid. p. 236; ditto (April 7, 1565), ibid. p. 237; ditto (28 March, 1566), ibid. p. 271. See also original and amended draft of the Advertisements, Strype's Parker, vol. iii. p. 84, No. 28; letter, Parker to Cecil (28 April, 1566), Parker, Corresp. p. 280; and Grindal to Dean of St. Paul's, State Papers, Domestic, Eliz. vol. xxxix. No. 76, which shews the date when these Advertisements were first acted upon in London, viz., the 21st of May, 1566. From these documents it results that Parker kept pressing the Queen to give them legal authority, and that the Queen, under

(1) Law Rep. 3 P. C. 605.

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the influence of the Puritan party, refused. As to the persons against whom they were directed, see letter, Parker to Cecil, (12 April, 1566), Parker, Corresp. p. 277; Grindal to Zanchius, in the Remains of Archbishop Grindal, Parker Society, pp. 338–340. As to the view taken of the Advertisements, see note by Card. Doc. Ann. vol. i. p. 321; the Canons of 1571, Card. Synodalia, vol. i. p. 126, vide note; Canons of 1575, ibid. p. 136. See *Keyley* v. *Manning*. (1) He then referred to Collier's Ecclesiastical History, vol. ii. fo. 494; Carte's History of England, ed. 1752, vol. iii. p. 420. Neal's History of the Puritans, ed. 1732, pp. 188, 204. For the Advertisements themselves see Card. Doc. Ann. vol. i. p. 321, et seq. (where they are by mistake dated in 1564). They were first publicly acted upon when Parker sent them to Grindal, the 21st of May, 1566, with directions to forward them to the Dean of St. Paul's. They were, as may be seen from their contents, pastoral letters drawn up in compliance with the Queen's order. One of their objects was to overcome the reluctance of the Puritans to wear surplices. They certainly were not a taking of further order under the Act of Uniformity. Moreover, throughout the reign of Elizabeth the Prayer Book continued to be published containing the Ornaments Rubric entirely unaltered.

As to (3), did the Canons of 1604 repeal or alter the Act? See the account of the Hampton Court Conference, 1603–4, in Card. Conf. p. 169. James I.'s Prayer Book was authorized by King James' letter of the 9th of February, 1603–4, ibid. p. 217, and proclaimed on the 5th of March following, ibid. p. 225; at which date, at the latest, it had the force of law through the exercise of power reserved to the king by the proviso in the Act of Uniformity. The Canons were submitted on the 2nd of May, and subsequent to the 9th of July were published; and consequently, the Prayer Book was not in any sense derived from the Canons, as was supposed in *Hebbert* v. *Purchas*. (2) It repeats the words of the Prayer Book of 1559 in regard to ornaments, and therefore James I. and his advisers could not have supposed that the Rubric of 1559 had been altered by the Advertisements. Even if Convocation had intended to repeal

(1) Croke, Charles, 180. (2) Law Rep. 3 P. C. 605.

any part of the Prayer Book of 1559, it is difficult to assign their exact legal value to the Canons of 1604. See *Middleton* v. *Crofts* (1), where they were held not to be binding on the laity, and *Marshall* v. *Bishop of Exeter*. (2) In *Hebbert* v. *Purchas* (3) the canons are supposed to repeal a rubric which has been already repealed, and then to revive it by enactment. [He referred to the 24th, 25th, 58th, and 14th Canons.] Then came the Committee of the House of Lords in 1641 (Card. Conf. pp. 238 and 270–277; Collier's Ecclesiastical History, vol. ii. p. 799), who in their third consideration treat Edward VI.'s vestments as still commanded to be in use.

As to (4), in the Savoy Conference in 1661 (Card. Conf. p. 269), the Nonconformists objected to the then Prayer Book, which afterwards became the Prayer Book of 1662, on the ground that it sanctioned the use of these vestments, and the bishops treated the objection as well founded: see Card. Conf. pp. 314, 310–12, and 345–351. See also The Grand Debate, printed in 1661, p. 118. In *Hebbert* v. *Purchas* (3) the dispute is said to relate to the surplice only. It is also said that the difference between the Prayer Book of 1603 and that of 1662 was intended to meet the objection urged by the Puritan divines about the vestments. [He produced a photograph containing the Rubric of 1603–4 as altered by Bishop Cosin in his handwriting in the edition of the Prayer Book in 1619, now in the Cosin Library at Durham.] The Rubric of 1662 corresponds verbatim with the statute of 1 Eliz., c. 2, leaving out the words "until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of Her Majesty's Commissioners," and inserting the words "at all times of their ministration," which are taken from the Prayer Books of 1559 and 1603. The true construction of the rubric is, that at all times whatsoever the clergyman is to use such ornaments as are prescribed for those times by the Prayer Book of Edward VI. The word "retained" found its way into the present Prayer Book from the proviso in 1 Eliz. c. 2. It does not mean what was in force during the reign of Mary, but in the reign of

(1) 2 Atk. 650. (2) Law Rep. 3 H. L. 17.
(3) Law Rep. 3 P. C. 641.

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Edward VI. It is a fallacy to say that it means that you are to retain an existing practice as against an obsolete law.

[THE LORD CHANCELLOR referred to s. 24 of the Act of 1662.]

The effect of that is to keep in force the Acts of Uniformity of Elizabeth and Edward VI., and to put the new Prayer Book in the same position as the book passed in 2 Edw. VI. [He then referred to a fac-simile of the original corrected draft from which the present Prayer Book was produced.] It appears therefrom that the alteration made in the Ornaments Rubric was not regarded as sufficiently important to be included in the list of alterations appearing on that draft. It was evidently regarded as merely verbal. Bishop Cosin's view of its interpretation is regarded as important in *Hebbert* v. *Purchas.* (1) But see Bishop Cosin's Notes on the Prayer Book, contained in vol. v. of his works in the library of Anglo-Catholic Theology, p. 42, shewing that in his opinion the Rubric of 1603 authorized vestments. See also, ibid. pp. 438–41. While he regarded them as legal in his Visitation Articles he only inquired for the surplice, because he knew practically that there would be no use in asking for more. Then there is a series of writers of great eminence who have from time to time asserted the legality of these ornaments.

[THE LORD CHANCELLOR There is a distinction between such expressions of opinion and Visitation Acts and Articles of an official character in the face of the world.]

They are as follows: Thomas Bennett's Paraphrase on the Book of Common Prayer, 2nd ed. p. 2, cited by Stephens in his Book of Common Prayer, vol. i. p. 351; William Nicholls' (1710) Commentary on ditto; Charles Wheatley's Rational Illustration of ditto, 1st ed. p. 32 (1710); A Rational Illustration of ditto, pp. 97–107, Oxford, 1810; Johnson's Clergyman's Vade Mecum (1775), p. 21; see Gibson's Codex (1713), vol. i. pp. 361, 363, ed. (1761), 201, 390; Burn's Eccl. Law, vol. iii. p. 437 (9th ed.); Dr. Stephens' Prayer Book, vol. i. p. 367; Baxter's Life, ed. (1696), p. 369. As to the presumption of there having been some legal ground for the disuse of ornaments, *Hebbert* v. *Purchas* (1) relies on *McDougal* v. *Purrier* (2). Here, however, there is no question as to what really

(1) Law Rep. 3 P. C. 605. (2) 4 Bligh. H. L. C. (N.S.) 433.

passed in reference to the Advertisements, and actual evidence cannot be displaced by presumption. [He referred again to the statute of 1662 as interpreted by *Liddell* v. *Westerton* (1) and *Martin* v. *Mackonochie*. (2)]

Secondly, with regard to the wafer bread. There is no evidence that this was not bonâ fide bread.

[THE LORD CHANCELLOR. Are we to understand that it was leavened bread?]

The word bread does not include the presence of leaven. There is no law as to the shape into which it is to be cut; its circularity and thinness are not illegal.

The Rubrics of 1552, 1559, 1604, and 1662, and Scotch Liturgy of 1637, the Injunction of Queen Elizabeth, cited in *Hebbert* v. *Purchas* (3) (see also Card. Doc. Ann. vol. i. 234), shew that the cutting a piece of bread into a round shape is consistent with the present Liturgy established by the Act of Uniformity, because that Act differs in a very slight and immaterial manner from the Rubric of Elizabeth. With regard to the Injunctions, Burnet's History of the Reformation, vol. ii. pp. 614–616 (Nares' edition); Parker, Corresp. p. 277; Parker to Cecil, 12 April, 1566; and Parker to Parkhurst, 17 May, 1574, ibid. p. 457–8; ditto, 14 June, 1574, ibid. 459; Order of the Privy Council, 26 July, 1580, in Peck's Desiderata Curiosa (1732), and Letter of Lord Burghley and Walsingham to Chaderton, ibid. No. 20, p. 18; the answer of the Dean of Canterbury to the Visitation Article (1569), Strype's Parker, vol. i. pp. 364–5; cf. Card. Doc. Ann. No. 73, question 5 p. 356; Bishop Cosin's works, vol. v. p. 481, may be consulted.

Thirdly, with regard to the position of the celebrant. It is contended, upon a comparison and consideration of all the rubrics, that the act which the appellant did is not forbidden, either directly or indirectly, by anything contained in the rubrics, and that, on the contrary, the way in which he performed the service was a legal way; whether there be other legal way of performing it or not. There is a latitude left by the rubrics as to the position of the table, which may be placed either altarwise or tablewise, and

(1) Moore's Special Report, pp. 158, 159.

(2) Law Rep. 2 P. C. 390–392.

(3) Law Rep. 3 P. C. 605.

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still more so as to the position of the celebrant. Nothing is said as to the points of the compass, either in regard to the church or the table. The table must be either in the body of the church or the main chancel. True, the expression "north side" is used, but accepting the view in *Hebbert* v. *Purchas* (1), that at the Reformation the oblong table was usually placed lengthwise along the church, eventually the long side got and retained the name of north side, just as the north-west provinces of India retained that appellation, though they are neither north nor west. Moreover, the direction as to the north side only applies to the first two prayers. "Standing before" the table means standing in front of the middle of the long side of the table. Before the civil wars the table was usually in the body of the church, and the old rubric was "the priest standing up shall say as follows." But Laud and others placed the table at the east end, to make it look more like an altar, and the eastward position was assumed. After the wars the high church party drew up the rubric as it now stands. Compare the rubrics in the Marriage Service. See also in the Coronation Service, Phillimore's Eccl. Law, p. 1059. The position assumed by the appellant is not forbidden by the rubrics, and the case of *Martin* v. *Mackonochie* (2) is absolutely inconsistent with its being illegal.

Fourthly, with regard to the legality of the crucifix, see 11th article of Charge. There was a faculty for the screen, and a question whether such faculty included the crucifix. It is not the object now to raise any technical question as to the faculty, but to try the legality of the figure.

[THE LORD CHANCELLOR. Their Lordships cannot, in a case of this kind, accept an admission between the parties in the place of a faculty if a faculty be required.]

[He then referred to the faculty and to 37 & 38 Vict. c. 85, s. 8, and the evidence.]

Unless the decoration be illegal in itself it is covered by the faculty which authorized the screen; and the only words in the Public Worship Regulation Act which can reach it at all are the words "decoration forbidden by law."

[THE LORD CHANCELLOR referred to s. 14.]

(1) Law Rep. 3 P. C. 605. (2) Law Rep. 2 P. C. 381.

Your Lordships under that section could grant a faculty if the ornament were not illegal. Lord Penzance referred to the distinction drawn in *Liddell* v. *Westerton* (1) between crosses and crucifixes, but that distinction really relates to movable crosses and crucifixes carried about in procession, and not to an architectural decoration. *Liddell* v. *Westerton* (1) turns mainly on the definitions of the word "ornament." The Court was dealing with crosses which were ornaments; and the result was that architectural decorations lay without the scope of the Ornaments Rubric. See *Phillpotts* v. *Boyd.* (2) The question is, has this figure been set up for purposes of decoration only, or is superstitious reverence likely to be paid to the figure upon it? Lord Penzance's view is shortly, this cannot be a decoration, because a thing of so painful a character could never be used as an architectural decoration. It must moreover be taken in connection with associations which speak for themselves; and this particular subject has always been regarded by artists of the highest genius as fit for any kind of artistic treatment. It is, morever, less open to superstitious observance than the windows in St. Margaret's Church and the reredos in Exeter Cathedral.

A. Charles, on the same side. *Hebbert* v. *Purchas* (3) differs from *Liddell* v. *Westerton* (1) and *Martin* v. *Mackonochie* (4), not merely as to the character of the legislation, 1551–1662, but in the construction placed upon the Ornaments Rubric; the two latter saying that the rubric and statutes of Elizabeth, the Prayer Book of James and that of 1662 meant the same thing, the former that the Ornaments Rubric of 1662 was "recast entirely," because of the introduction of the words "retained" and "at all times of their ministration." As to "retained," the only statutory rubric previous to 1662 was 1 Eliz. c. 2, s. 25, to which the revisers of 1662 naturally recurred; the Eliz. Prayer Book not having been scheduled to the Eliz. Act, and the Prayer Book of James not having parliamentary authority. In that statute "retained" beyond all question refers to the future. It is to be read with reference to the words "further order," i.e., "retained until." Consequently in

(1) Moore's Special Report, pp. 158, 159.

(2) Law Rep. 6 P. C. 435.

(3) Law Rep. 3 P. C. 605.

(4) Law Rep. 2 P. C. 381.

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1662, when making a final revision, it is equivalent to "remain and be," used without reference to any thought of keeping only what was then actually in use. As to "at all times of their ministration," Baxter and the Puritans considered that this made no material difference to the rubric: see Silvester's Life of Baxter, Book 1, pt. 3, pp. 23, 38 and 39, and pt. 1, p. 369. The Visitation Articles of Cosin in 1662 really throw no light on the subject, for they were drafted in reference to the Prayer Book of James: see Cosin's Works, vol. v. Particulars to be considered, explained, and corrected in the Book of Common Prayer—Second Report of the Ritual Commission, pp. 601, 610, 619. The surplice does not run through the Book of 1549 from end to end; no dress, for instance, is prescribed for the saying of the Litany. "At all times of their ministration" are equivalent to "Communion and at all other times."

The Injunctions were not a "further order" under 1 Eliz. c. 2; for they were not taken with the advice of the Metropolitan or the Ecclesiastical Commissioners; the date of the Injunctions being June 1–24, 1559, that of the Ecclesiastical Commission being July 19, and of the Consecration of the Archbishop, December 17. As to the commission referred to in *Hebbert* v. *Purchas* (1) as carrying out the Injunctions, see Card. Doc. Ann. vol. i. p. 249; Strype's Life of Grindal, pp. 35, 36. As to the Interpretations of the Injunctions, see Strype's Life of Parker, vol. i. p. 183. With regard to the Advertisements, cf. as to form and authority, the Queen's warrant for the establishment of the High Commission, Card. vol. i. p. 255, and the Queen's letter about the Calendar from the Prayer Book, Card. vol. i. p. 294. See also Strype's Parker, vol. i. p. 313. As to the frequent inquiries for the surplice ordered by the Advertisements being a proof of the Advertisements being actively enforced, see Rep. Rit. Com. pp. 403, 406, and Card. Doc. Ann. vol. i. pp. 337, 355, 356, where the surplice is treated as ordered by the Rubric and Injunctions. See also some articles of Whitgift, Card. Doc. Ann. vol. i. p. 468, and letter, Queen to Parker, 20th of August, 1571, Parker Corresp. p. 386. In fact the consent of the Metropolitan was never obtained to the Injunctions; nor that of the Crown to the Advertisements. As to the Canons of 1604 being a further

(1) Law Rep. 3 P. C. 605.

order under s. 25, there was no Metropolitan at that time, and the authority given was a personal authority to the reigning sovereign, otherwise s. 25 would give parliamentary authority to the Prayer Book of James, and that would be the "further order," and not the canons. See James's two proclamations, Card. Conf. 2nd ed. pp. 217 and 227. If the Prayer Book is statutory it repeals the Advertisements by its Ornaments Rubric. The canons themselves direct the enforcement of the rites and ceremonies prescribed in the Prayer Book; see Canon 14. See also the Act of 1662, s. 24, which does not refer to the canons: cf. the parallel legislation in Edward VI.'s reign. In 1552 the revisers annexed the altered book to their Act, and said the former Act was to stand in force, to establish the book as altered. In 1662 the revisers annexed their book to their Act, and also enacted, in almost identical language, that the former statutes relating thereto should remain in force.

The charge of administering bread in the wafer form does not involve an ecclesiastical offence. See Rubric of 1662, which merely adds "dissension" to "superstition" in the Prayer Book of Elizabeth. The Injunctions of Elizabeth expressly enjoined the use of wafer-bread, and must be regarded as a contemporary exposition of what the Prayer Book would allow. See Parker to Cecil, 8 Jan. 1570–1, Parker, Corresp. vol. i. p. 375. Calvin at Geneva, was in the habit of using wafer-bread; see Cosin's Works, vol. v. p. 481; Hooker, Eccl. Polity, Book iv. c. 10 (1st vol. Keble's ed. p. 449). The usage for some time was of wafer-bread; see notes of Bishop Wren in Bishop of Chester's Fragmentary Illustrations of the Book of Common Prayer. See also Second Rep. Rit. Com. pp. 416, 562. The words in the rubric "such as is usual to be eaten," refer to composition and not to shape.

As to the position of the celebrant, during the prayer of consecration, the Rubric of 1662 immediately before it is the governing rubric, and the prefatory rubric does not reach so far. Primarily the north side rubric refers only to the Lord's Prayer and collect following; the words "priest standing *as before*" are required to send the priest back at a later stage to the north side. With regard to "before the table," and "before the people," the Rubric of 1662 was introduced after attempts had been made by some,

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including Bishops Cosin and Wren, to use the eastward position; see Cosin's Corresp. published by the Surtees Society, vol. i. p. 190, article of Charge, p. 22; and Wren's Parentalia, pp. 14, 103, 104.

See Prayer Book of 1619, in which Cosin records alterations, (Corresp. vol. ii.). "Before the table," means before its longer side. Though there were many varieties of position for the table, 1552-1562, yet in 1662, the altarwise position was by no means uncommon. Laud's order to place the tables at the east end and rail them in was generally obeyed: see Hook's Lives of Archbishops of Canterbury. The Canon of 1640, contemplates the table remaining as a rule at the east end. "Before the people," which only occurs in this rubric, though there are similar expressions in the Marriage Service, means merely in presence of the people, and refers only to the breaking of the bread and not to the taking of the cup into the priest's hands. Baxter presented to the Savoy Conference a form of rubric acceptable to the Puritans, using the words "in sight of the people;" see Hall's Reliquiæ Liturgicæ, vol. iv. p. 70. That was not adopted; but the object of the rubric was to prevent private celebrations, and the bringing the bread already broken into pieces from the vestry or some place near the church. By Article 28 of the Church, the Sacrament is not to be reserved. He referred to the Marriage Service, where "before God and this company," applies to two persons placed with their backs to the people.

Lastly. With regard to the crucifix. Under sect. 14 of the Public Worship Regulation Act, 1874, an opportunity may be given to apply for a faculty so as to cure the technical difficulty. The substantial question is whether on the evidence this is a decoration liable to be abused. [He referred to *Phillpotts* v. *Boyd.* (1)]

[THE LORD CHANCELLOR:—Is there anything to shew what access there was on the part of the people of the country to the First Prayer Book of Edward VI. at the time of the Act of Uniformity of 1662. Was it supposed to have been accessible, kept in any of the churches, or otherwise accessible to the people?]

It was superseded only three years after its enactment, which

(1) Law Rep. 6 P. C. 466.

was 110 years before 1662. [*Dr. Stephens* referred to Strype's Life of Whitgift, vol. iii. p. 92, shewing that in 1584 Archbishop Whitgift had never seen the books of Edward VI.]

Dr. Stephens, Q.C., for the respondents, said that his argument would be subsidiary to the main principle decided in *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) viz. that the Prayer Book is to be regarded as the complete and sufficient guide of worship, and that no person has a right to add thereto or omit therefrom. As regards the legal ornaments of the minister, eight ornaments are specified in the Prayer Book of 1549; see the Liturgies, Edward VI. p. 76, ed. Parker Society and p. 157. The present case affects six of them: (1). Sacrificial vestures, viz., the vestment or chasuble, the alb and the tunicle; (2), non-sacrificial, the cope, the surplice, and the hood. Under the Sarum Missal, which was in force till the first Act of Uniformity, the Communion Office of which was retained in the Book of 1549, the chasuble, alb, and tunicle were the vestures exclusively ordered to be worn at the altar at the sacrifice of the Mass. As to the Book of 1549, see *Liddell* v. *Westerton*. (3) For an account of the tunicle see Dr. Rock's Hierurgia, p. 451; of the chasuble, ibid, pp. 439, 436; of the alb, ibid. p. 424. As to the hood, it is a mere academical distinction; respecting the cope, see Dr. Rock's Church of our Fathers, vol. ii. p. 44, it is a processional as the chasuble is a sacrificial vestment. There were two classes of copes, the superstitious and the plain. The former were ornamented with figures pictures and superstitious images, and were destroyed under Elizabeth and Edward VI. The plain cope had no symbolical representations on it, and from the first Act of Uniformity to the present time, with the exception of the reign of Mary, and a few months of Edward VI., it has been a legal ornament; see 24th Canon of 1603, and *Hebbert* v. *Purchas*. (2) The surplice was the choral, the alb the sacrificial ministering robe; see Dr. Rock's Church of our Fathers, vol. ii. p. 7. No rubrical authority can be produced for wearing a tunicle or alb with the surplice; a sacrificial and a non-sacrificial robe cannot be worn together. Under the Sarum Missal and the rule of the Latin

(1) Law Rep. 2 P. C. 365. (2) Law Rep. 3 P. C. 605.
(3) Moore's Special Report, p. 179.

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Church, the celebrant of the altar service must wear both chasuble and alb; by statute in 2 Edw. 6, the bishop was authorized to celebrate in cope and surplice; in the Prayer Book of 1549, the celebrant, being below a bishop, was to wear a white alb plain with a vestment or cope (Liturgies, Edward VI. p. 76.) The Book of 1552 destroyed all remains of the Mass and altar service, and rendered the chasuble and alb illegal. Then followed the destruction of the sacrificial vestments, and from 1559, with the exception of the illegalities which have arisen since the publication of the Tracts for the Times, not a single chasuble or alb has been used in the Church of England; while the cope, surplice, and hood, introduced by parliament in 1549, have been in use and retained by Elizabeth and Charles II.'s Acts of Uniformity till the present time. The book of 1552 only lasted a year and eight months owing to the death of Edward VI.; it abolished sacrificial vestments and the cope, but the latter ornament was restored by Elizabeth. Her Act of Uniformity substantially legalised the book of 1552; but the proviso of s. 25 empowered her to retain or discontinue all or any of the non-sacrificial vestures. The proviso applied exclusively to such ornaments as were not inconsistent with the policy and leading principles of the new service prescribed by the Act of 1559; the superstitious service being destroyed, its adjuncts, the sacrificial vestments, dropped without express words of prohibition. [He referred to Sir *E. Walgrave's Case* (1); certain proceedings in the Bishop's Court at Durham, published in vol. xxi. of the Surtees Society's publications, entitled Depositions and other Ecclesiastical Proceedings, pp. 127, 136, 143, 148, 169, and 170; Strype's Ann. vol. i. pt. 2, pp. 132, 133, 125; Neale's Puritans, vol. i. pp. 168, 132, 125.]

With regard to the authority of the Injunctions, they were issued by the Queen, intrusted for execution to Royal Commissioners, and accompanied by Articles of Visitation. They were always received as law: see letter, Parker to Cecil, 1570–71, Parker's Corresp. p. 375; Card. Doc. Ann. vol. i. pp. 233, 234; *Faulkner* v. *Litchfield* (2). They were universally submitted to in spite of the hostility of a large body of the clergy. The Act itself was passed without any mention in it of "the Lords spiritual," every one of whom voted

(1) 2 Dyer, 203, a.

(2) 1 Rob. Eccl. 228.

against the bill: Card. Conf. p. 30. The 23rd Injunction contemplated the destruction of all monuments of superstition, and the 2nd Visitation Article was framed to give effect to it: see Peacock's Returns, pp. 162, 57, 68, 147, 61, 67.

[THE LORD CHANCELLOR. If they were to be destroyed, how was it that clause 47 directed inventories to be delivered?]

They were placed in the hands of the visitors who ordered that some of the ornaments should be retained for use in the church (ibid. pp. 42, 49, 114), that others should be destroyed or defaced; and that the remainder should be placed in official custody (ibid. pp. 162, 160.) The commission of 1559 (see State Papers, Domestic, Eliz. 1559, vol. iv. No. 34, vol. vii. No. 79), having removed from use in the churches all the sacrificial vestments, a second commission was in 1565 sent down for the purpose, calling in all those vestments that were in private or official custody that they might be destroyed. No attempt was made on the other side to shew that the chasuble or alb was legally in use in any church since 1559. As to the statement that articles "confessedly legal" were destroyed: see Peacock, pp. 49, 108, 37, 166, 118, 120. Peacock's Returns establish that the Injunctions of 1559 immediately removed all chasubles and albs from use in the churches at the same time that the Book of 1559 came into use. [He referred to Laud's Works, vol. v. pp. 414, 401, 448.]

[THE LORD CHANCELLOR. Do you find the distinction between superstitious and plain copes taken in any of the books?]

For superstitious copes: see Second Rep. Rit. Com. p. 402; Dolby's Church Furniture, pp. 105, 106; Rushworth's Hist. Coll. vol. iv. p. 209; Cosin's Works, vol. iv. p. 394; 24th Canon of 1603; Smart's Treatise on Altars, ed. 1629, p. 19; Collectanea Curiosa, vol. ii. p. 280, Oxf. 1781; Dr. Rock's Church of our Fathers, vol. ii. p. 30. The vestures worn in the "latter year" of Edward VI.'s reign were the surplice and a plain white cope: see Dysse, Exchequer Court of Augmentation, vol. diii. Inventory of Church Goods, made Sept. 1552. No other injunction refers to the garments worn during divine service: cf. Visitation Article of 1563; Second Rep. Rit. Com. p. 403, and Peacock's Returns, p. 114; and Interpretations, Card. Doc. Ann. vol. i. p. 236, which were prepared in 1559: see Card. Doc. Ann. vol. i. pp. 239, 263,

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259. [He then referred to Parker's Corresp. letter, 27th of August, 1559, p. 74; Card. Doc. Ann. vol. i. p. 240, to shew that there were two classes of injunctions, those annexed to the commission, and those not annexed, called "interpretations and considerations." For evidence of user he referred to Strype's Parker, vol. i. p. 114: Stow's Ann. p. 640; Burnet's Hist. Ref. vol. vi. pp. 445, 446; ibid. vol. iii. p. 499. For the state of the Church in 1560 and afterwards, see Heylyn Hist. Ref. vol. ii. p. 314; Bishop Sandys, Zurich Letters, vol. i. 1st series, p. 72–74: Strype's Ann. vol. i. pt. 1, p. 501; Strype's Parker, vol. i. pp. 302, 308, 364, 427, 429; Parker, Corresp. p. 226.]

The Advertisements were issued shortly after January, 1564–5 (Card. Doc. Ann. vol. i. p. 321), see Orders, 2, 3, and 4, p. 326. They dealt with the cope the surplice, and the hood, no other vestures were then in use. The presumption is in favour of the validity of these orders: see *Sichel* v. *Lambert* (1), and they were universally obeyed as lawfully binding: see Grindal to Dean of St. Paul's; Domestic State Papers, Eliz. vol. xxxix. No. 76; see also ibid. vol. clxiii. No. 31; Second Rep. Rit. Com. p. 418; Card. Doc. Ann. vol. i. p. 355; Parker's Corresp. p. 272; Collectanea Curiosa, vol, ii. p. 280; 24th Canon of 1603, and Canon of 1640; Card. Synodalia, vol. i. p. 404. The authority of the authorized version of the Bible is a case analogous to that of the Advertisements; no trace can be found of any royal sanction formally given to it: see Westcott's History of the English Bible, 2nd ed. p. 123. See also *Devine* v. *Wilson*. (2)

Respecting the Hampton Court and Savoy Conferences, the substantial question at issue was whether or not the surplice should be worn. [He referred to Cardwell's Conf. pp. 314, 350, 351, 310, 345, and also to 5 Laud, Works, pt. ii. pp. 401, 414, 448.] As to the theory of maximum and minimum of ritual, it sanctions variety, and is inconsistent with Acts of Uniformity: see *Martin* v. *Mackonochie* (3); *Hebbert* v. *Purchas* (4). With regard to Cosin's notes, they are those of a theological partisan: see four charges against him: Rushworth's Hist. Coll. vol. iv. p. 208. The notes, moreover, were not published till 1709, which was thirty-

(1) 15 C. B. (N.S.) 789.
(2) 10 Moo. P. C. 527.
(3) Law Rep. 2 P. C. 383.
(4) Law Rep. 3 P. C. 645.

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eight years after his death—rough notes written in early life in different Prayer Books. [He referred to Cosin's Works, vol. v. p. 43.]

With regard to the words, "shall be retained and be in use," the language of the Ornaments Rubric speaks exclusively from 1662, the date of its enactment. For the legalisation of the ornaments of the minister at the time of prayers and sacrament two conditions are required by that rubric; first, they must have been in use immediately before the enactment of the rubric in 1662, otherwise they could not have been "retained;" secondly, they must likewise have been in use by authority of parliament in 1549. Three ornaments of the minister fulfil both those conditions, viz., the cope, surplice, and hood in cathedrals; the surplice and hood in parish churches. The chasuble and alb fail to fulfil the first condition, for they had ceased to be in use since 1559. [He referred to Maxwell on Statutes, p. 66; and on the construction of the word "retained" to 3 & 4 Edw. 4, c. 10, s. 5; preface to Prayer Book; Coke's 2nd Inst. p. 287; *Liddell* v. *Westerton* (1); *Elphinstone* v. *Purchas.* (2)] Those ornaments of the minister are only retained as legal which are necessary for or consistent with the performance of services prescribed by the Prayer Book; and ornaments prescribed by Edward VI.'s Prayer Book are not now lawful in those cases in which the service to which they belonged has been removed from the Prayer Book, and they themselves, with other remnants of superstition, destroyed. For instances of obsolete ornaments, see Liturgies, Edward VI. pp. 112, 139, 85, 141; Peacock, pp. 36, 145, 160, 161. As for the value of Laud's Prayer Book referred to on the other side, see Card. Conf. pp. 378, 389. It is said that a tabula rasa had been made, and therefore that in 1662 there was nothing to retain. But the Church is an institution, and survived throughout the Commonwealth. 1 Eliz. c. 2, was never repealed, see also Act of 1662, s. 24, and preface to Prayer Book. The Canons of 1603, and the practice under them previously to 1662, are evidence as to what is meant by the word "retained;" see *Reg.* v. *Chadwick.* (3) The history of the last 300 years establishes a general,

(1) Moore's Special Report, p. 159. (2) Law Rep. 3 A. & E. 94.
(3) 11 Q. B. 233, 241.

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continuous, open, authorized, and unquestioned user in the Church of England of cope, surplice, and hood, to the exclusion of chasuble and alb: see *Hebbert* v. *Purchas*. (1)

As to the eastward position. Provision has been made in the rubrics for the position both of the table and of the minister. It is in direct opposition to the Prayer Books of 1552, 1559, 1604, and 1662 to place the table altarwise against the east wall or end of the church or chancel during the administration of Holy Communion. The place of the table is governed in all four books by the fourth paragraph of the First Communion Rubric, and is at Communion time in the body of the church, or that part of the chancel where morning and evening prayers are appointed to be said (see Liturgies, Edward VI. p. 217); at other times it may stand elsewhere. Its present ordinary position is illegal at Communion time. The literal sense of the rubric is supported by the practice of the Church from 1 Eliz. to 1662; except in those cases where Laud and his party turned the table against the will of the laity into the altarwise position, and placed it close up to the wall of the east end of the chancel. [He referred to *Liddell* v. *Westerton*. (2)] The consecutive legislation on the subject is to be found in the Prayer Book of 1549, which is ambiguous, see ibid. p. 179; Card. Doc. Ann. vol. i. p. 100 (Order of 1550), explained in *Faulkner* v. *Litchfield* (3); First Communion Rubric of 1552, par. 4; Liturgy, Elizabeth, p. 180; Injunctions of 1559, see Card. Doc. Ann. vol. i. p. 234, and *Hebbert* v. *Purchas* (4); Order of 1583, Appendix to Second Rep. Rit. Com. p. 426, Art. 6; Interpretations, Card. Doc. Ann. vol. i. p. 238; case in 1567 against the churchwardens of Sedgefield, Surtees publications, vol. xxi. p. 119; 82nd Canon of 1603, see Second Rep. Rit. Com. p. 452. The result of this legislation was to destroy all resemblance to the Roman Catholic altar. Then came the Laudian illegal innovations, dating from the 25th of January, 1616–17: see Le Bas's Life of Laud, p. 28; Canterburies Doome, p. 78; Hook's Life of Bramhall, p. 49; Rushworth, Hist. Coll. vol. iv. p. 351; Hierurgia Anglicana, p. 181; see an Order of 1633, Card. Doc. Ann. vol. ii. p. 237.

(1) Law Rep. 3 P. C. 642, 644, 650.
(2) Moore's Special Report, pp. 183, 185.
(3) 1 Rob. Eccl. 224, 241.
(4) Law Rep. 3 P. C. 658.

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[The LORD CHANCELLOR:—May not that order have been made by the king with the consent of the Metropolitan, under 1 Eliz. c. 2?]

It was an act of adjudication in a cause affecting a single church, and did not purport to be a legislative order. [He referred also to Canterburies Doome, p. 62, and Howell's State Trials, vol. iv. col. 453; Canterburies Doome, p. 97, 98, 104; *Faulkner* v. *Litchfield* (1); Journals of the House of Commons, vol. ii. p. 32 (20th Nov. 1640); Second Rep. Rit. Com. p. 556; Proceedings in Kent, 1640, published by Camden Society, 1861, pp. 104, 106, 108, 122, 132, 159, 175, 182, 185, 192, 227, 238; D'Ewes' Autobiography and Correspondence, 1636, vol. ii. edited by Halliwell, p. 142; Rep. Com. Hist. MSS. vol. iv. pp. 34, 47, 64, 74, et al; Journals House of Commons vol. ii. p. 279; Journals House of Lords, vol. vi. p. 200, 27th Aug., 1643; Cobbett Parl. Hist. vol. iii. col. 162.]

Next, was there a general practice in 1660–2 of placing the tables altarwise at Communion time against the east wall of the church or chancel? There was no complaint to that effect made at the Savoy Conference; and the Puritan ministers retained their benefices till the 24th of August, 1662. [He referred to Bishop of Lincoln's triennial charge, 1876, p. 14 in note.] The Act of 1662 did not alter the legal position of the table, and left the rubrics on that point untouched. [He referred to a copy of the MS. book annexed to the Act of 1662, now in the library of the House of Lords.]

[SIR J. STEPHEN:—The erasures and everything are printed word for word in Fourth Rep. Rit. Com. p. 17.]

Only the literal construction of the Act can be relied upon for its true interpretation: see *Brett* v. *Brett* (2); *Arding* v. *Bonner* (3); *In re Dean of York.* (4) Then as to the direction of the table in its ascertained legal position; its *side*, not its end, must be towards the north; it must stand not altarwise, but tablewise. The 4th paragraph of the First Communion Rubric was first introduced into the Book of 1552 at the time when tables were substituted for altars. [He referred, as to distinction

(1) 1 Rob. Eccl. 240, 241, 245–7.
(2) 3 Addams, 217.
(3) 2 Jur. (N.S.) 763.
(4) 2 Q. B. 34.

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between end and side, to Bishop Williams' The Holy Table, Name, and Thing (1637), pp. 52, 55, 57; to 82nd Canon of 1603; Cardwell, Synodalia, vol. i. p. 404; Card. Doc. Ann. vol. ii. p. 252; Rushworth Hist. Coll. vol. iv. p. 351; Cobbett, Parl. Hist. vol. ii. p. 861; Canterburies Doome, p. 479; Strype's Parker, vol. i. p. 364; see also Welsh translation of Prayer Book made under Act of 1662, s. 27; Bishop of St. Asaph's charge of 1874.] He submitted that the Acts of Uniformity of 1552, 1559, and 1662, required that at Communion time the Lord's table should stand with the ends east and west, thus providing a side to the north at which the priest is to stand and officiate. A gradual change since 1662 led to the general adoption in the present day of the altarwise position of the table: see Heylyn Hist. Ref. vol. i. p. cx.; Ed. Eccl. Soc. Camb. 1849; Diary of Bishop Cartwright (Camd. Soc. 1843), p. 72; Bloxam's Gothic Architecture, p. 487. For the continuance of the ancient and legal use: see Robertson's How shall we Conform to the Liturgy? p. 145, note 49, ed. 1869; Howson's Before the Table, pp. 42, 44. For protests against the illegal change: see Cobbett, Parl. Hist. vol. iv. cols. 415, 417. The change was favoured by the silence of the 4th Rubric as to the position of the table out of Communion time, by the secession of those opposed to it, by the negligence and indifference of the laity owing to the controversies as to the sacrifice of the Mass having ceased. Since the publication of the Tracts for the Times in 1841 the altarwise position of the table has resumed its doctrinal significance. But no practice or disuse can repeal the positive enactments of statute: see Dwarris on Statutes, p. 573.

Then as to the position of the minister: see *Hebbert* v. *Purchas.* (1) As to the argument that the Prefatory Rubric does not reach as far as the prayer of consecration: see Cosin's Corresp. pt. 1, p. 106; Surtees Soc. Pub., cited Law Rep. 3 P. C. 663; Liturgies, Edward VI. p. 87, 279, 278. The words "standing before the table" were first introduced into the Book of 1662 in order to facilitate the manual acts directed, which had been omitted from the Books of 1552, 1559, and 1604 in order to prevent elevation. "At the table" leaves the minister free which way he turns the face; "before the table" requires him to face the table. [He referred

(1) Law Rep. 3 P. C. 662, 661.

to *Hebbert* v. *Purchas* (1) and *Martin* v. *Mackonochie.* (2)] The rubrics in the Marriage and Coronation Service are not inconsistent with the table being placed altarwise in the body of the church or the midst of the chancel: see also Hall's Fragmenta Liturgica, Non Jurors, vol. v. pp. 10, 32. "Before the people" means "in sight of the people:" see the Welsh Prayer Book.

[LORD JUSTICE JAMES:—The literal re-translation of the words in the Welsh Prayer Book is "standing at the table" and "in sight of the people."]

See also *Hebbert* v. *Purchas.* (3)

[THE LORD CHANCELLOR:—I do not know if there are any authorized Latin translations, but in a Greek translation in 1665 by Dr. Dufour, printed at the University Press, the word "before" is also rendered twice, viz., "ἔμπροσθεν τῆς τραπέζης," and "ἐνώπιον τοῦ λαοῦ."]

Thirdly. As to wafer bread. Superstitions existed between 1559 and 1662 in reference to the thinness of wafers, and in consequence of their fashion being round: see Nicholl's Prayer Book Supplement, p. 28. Consequently wafers were prohibited in 1662.

[SIR JAMES W. COLVILE:—Were the words "it shall suffice" first introduced in 1662?]

No, in 1552. The Elizabethan Injunction, Card. Doc. Ann. vol. i. p. 234, is at variance with the rubric: see *Hebbert* v. *Purchas.* (4) Dissensions arose as to the round fashion: see Strype's Parker, vol. ii. p. 33; and the Injunction was relaxed: Collectanea Curiosa, vol. i. pp. 16, 19; Robertson's Liturgy, 3rd ed. p. 169. [He referred to 20th Canon of 1603; and Card. Conf. p. 392.]

Lastly. As to the crucifix. Besides the two classes of church ornaments propounded on the other side, there is a third, viz., objects of religious devotion, which are neither instruments used in the services, nor mere architectural decorations, e.g., the rood and the elevated crucifix in this case: see Heylyn, Hist. Ref. vol. i. p. 84; vol. ii. p. 112; Card. Doc. Ann. vol. i. p. 206; Peacock, pp. 43, 106, 122, 153, 170, et al; Dr. Rock's Church of our

(1) Law Rep. 3 P. C. 658–663.
(2) Law Rep. 2 P. C. 382, 378.
(3) Law Rep. 3 P. C. 660, 661.
(4) Law Rep. 3 P. C. 654.

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Fathers, p. 305. In *Phillpotts* v. *Boyd* (1) the crucifix was not one of the figures upon the reredos. [He referred to the Injunctions of Edward VI. No. 3; Card. Doc. Ann. vol. i. p. 7; ibid. p. 47; *Liddell* v. *Westerton*. (2)]

Benjamin Shaw, on the same side. First, as to vestments, the Injunctions of Elizabeth extend to the dress of ministers in church and as such are an order under 1 Eliz. c. 2. See Visitation Articles of Parker and Parkhurst: Second Rep. Rit. Com. pp. 403, 405, and 30th Injunction. The visitors dealt with vestments under the Injunctions: see *Attorney General* v. *Drummond* (3). As to whether they were a valid exercise of statutory power, first were any Ecclesiastical Commissioners in existence to give consent thereto? See Card. Doc. Ann., vol. i., pp. 230, 254. As to the date of Ecclesiastical Commission being 19th of July (see ibid. 255) while the Injunctions existed in June; see Coke's 4th Inst. pp. 326, 321, and Rymer's, vol. xv. pp. 532, 537; Strype's Ann. vol. i. pt. 1, pp. 205, 210, ed. Oxf. 1824, shewing that there must have been an earlier commission than the earliest now extant. Otherwise, the Ecclesiastical Commissioners would at least be in time to assent to the Injunctions before they were enforced; compare dates of Visitation Commissioners, Card. Doc. Ann. vol. i. p. 249; Strype's Ann. vol. i. pp. 245, 246, 247, and 248. Although the Injunctions do not recite the Act, it must be remembered that they extend to a variety of subjects not connected with the Act. The consent of the Ecclesiastical Commissioners will be presumed though not recited; see *Goodtitle* v. *Milburn* (4), As to the want of the Great Seal, they were appended to the Visitation Commissions which were authorized by the Great Seal.

As to the Advertisements, no doubt the Queen did delay her assent to them, as also to the Homilies. [He referred to Parker's Corresp. p. 177, Parker to Cecil; to an entry in the Council Books, October 27, 1566; Parker, Corresp. pp. 275, 276, 284; Keble's Hooker, vol. iii. p. 587, ed. 1845; Card. Doc. Ann. vol. i. p. 324; Cosin, vol. v. p. 90; Wren's Parentalia, p. 75.] As to the words, "public authority," used in relation to the Advertisements in certain documents, and said to be distinguished from

(1) Law Rep. 6 P. C. 466.
(2) Moore's Special Report, pp. 170, 171.
(3) 1 D. & War. 368.
(4) 2 M. & W. 853.

"royal authority," see Card. Doc. Ann. vol. i. pp. 413, 319, 221; 65th and 72nd Canons of 1604; Parker's Corresp. p. 451. As regards the construction of the Advertisements they could not be a mere episcopal order, for they vary from the First Prayer Book of Edward VI.; see Card. Doc. Ann. vol. i. p. 326. As to the document, Card. Conf. p. 270, referred to on the other side, that is of no authority, and moreover did not refer to vestments; cf. Card. Synod. vol. i. p. 404. As to the royal authority being given to the Advertisements, when the Sovereign appointed commissioners to take order, the assent of the Crown to such orders was not in practice given in a formal shape; cf. Card. Doc. Ann. vol. i. p. 294; Parker's Corresp. p. 134; Robertson's 2nd ed. of Heylyn's Reformation, p. 360; Card. Doc. Ann. vol. i. pp. 357, 398, 313. Supposing a formal ratification by the Queen of the Advertisements to be necessary, nevertheless on proof of authority having been given to draw them up and of their actual enforcement, such ratification must be presumed: see *Hebbert* v. *Purchas* (1); *Buron* v. *Denman* (2). [He referred to Disraeli's Curiosities of Literature, vol. vi. p. 187 (9th ed.).]

Supposing the Injunctions and Advertisements not to be binding the Canons of 1604 were a good order within the Act; when, although there was no Metropolitan, there undoubtedly were Ecclesiastical Commissioners: see Card. Conf. p. 218. The power under the statute survived to James: Card. Conf. p. 218; and to Charles I.; Card. Synod. vol. i. p. 387; see Hale's Pleas of the Crown, vol. i. p. 706. Canons 24 and 58 confirm the dresses of the Advertisements; they were either a taking of order under the statute or a recognition of the authority of the Advertisements. As to the restoration of the rubric by the republication of James I.'s Prayer Book, the canons were continually appealed to, so that any inconsistency between them and the Prayer Book was never imagined; see Hargrave's State Trials, p. 885; Cobbett's State Trials, vol. iv. pp. 456, 887, 891. As to a minimum of ritual having been ordained thereby: see Defence of the Apology, Jewel's Works, vol. iii. Parker Soc. Series, p. 176; cf. Card. Doc. Ann. vol. ii. p. 160; Second Rep. Rit. Com. 438.

Then as to the Rubric of 1662: if the construction on the other

(1) Law Rep. 3 P. C. 643. (2) 2 Ex. 167.

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side is valid, the Advertisements, Canons, administrative acts of the bishop, and church procedure for 200 years was founded on a breach of the law. He referred to Articles of Sancroft, Second Rep. Rit. Com. p. 654; *Martin* v. *Mackonochie* (1); *Gorham* v. *Bishop of Exeter*. (2) The rubric should be construed in accordance with the usage: see *Pochin* v. *Duncombe* (3); *Williams* v. *Pritchard*. (4) As regards the review of the Prayer Book, see the King's warrant, which set the Savoy Commission on foot; Card. Conf. pp. 298, 300; Pref. to the new Prayer Book. There is nothing to shew that any alteration in worship was intended. The Ornaments Rubric must not be construed as a section of an Act; the rubric is a schedule to an Act. There are no words in the legislation of 1662 which repealed s. 25 of 1 Eliz. c. 2, or any previous exercise of the power given thereby. It could not have been intended by leaving a rubric unaltered to bring into use for the first time a state of things which had never been seen in the Reformed Church at all, except for three years under Edward VI.; cf. Act of 1662, s. 1. Mere re-enactment does not work a repeal either of the original enactment or of what has been done thereunder. He referred to *Reg.* v. *Walker* (5); *Morisse* v. *Royal British Bank*. (6) The word "retained" speaks from 1662, and may well have a different reference to what it had in 1559: cf. *Reg.* v. *Justices of Kent*. (7) It has the same absolute meaning, but a different relative meaning, because it speaks from a different time. In *Liddell* v. *Westerton* (8) there was no question as to the dress of the minister, but only as to the ornaments of the church; as to its authority under those circumstances, see *Sheppard* v. *Bennett*. (9) As to the opinion of the revisers, see *Sheppard* v. *Bennett*. (10) [He referred also to Sylvester's Life of Baxter, pt. iii. p. 158.]

Secondly, as to the eastward position. Assuming the table may, in the discretion of the ordinary, remain at the east end during Communion, still it is unlawful for the minister to stand

(1) Law Rep. 2 P. C. 391.
(2) 15 Q. B. 73.
(3) 1 H. & N. 842.
(4) 4 T. R. 2.
(5) Law Rep. 10 Q. B. 355.
(6) 1 C. B. (N.S.) 67.
(7) 2 Q. B. 691.
(8) Moore's Special Report, p. 159.
(9) Law Rep. 3 A. & E. 256.
(10) Law Rep. 4 P. C. 416.

with his back to the people during the prayer of consecration. The object of the rubrics was not merely to prevent secret consecration, for though that is the practice of the Greek Church, it was never so of any Church in the West, where publicity of consecration is observed even if the elements be reserved. The way to obtain the meaning of the language used is either from contemporaneous usage or from shewing the circumstances surrounding the legislature of 1662: *Shore* v. *Wilson* (1). [He referred to Card. Conf. p. 321; to a Liturgy drawn up by the Puritans; Hall's Reliquia Liturgica, vol. iv. p. 70; Proctor's History of the Prayer Book, pp. 48, 49; Lasco's Opera, vol. ii. pp. 141, 163, 266; Parker's edition of Hooper, pp. 464, 465; Second Rep. Rit. Com. p. 520; Laud's Works, vol. iii. p. 345; Wren's Parentalia, p. 78; Hall's Fragmenta Liturgica, vol. viii. pp. 31, 32; Second Rep. Rit. Com. p. 626, 627, 648; Wilson's Works, vol. iv. p. 275.] The words "north side" originally meant the longer side of the table, but now they mean north end. The words "before the table," if they apply to the long side of the table, are exhausted by the act of ordering the elements, after which the minister returns to the north side; at any rate, they must not conflict with "before the people." He referred to *Martin* v. *Mackonochie*. (2) The difficulty only arises when the table stands against the east wall; and the object of the rubric plainly is to secure the more ready and decent breaking of the bread before the people. "Before the table," in case of difficulty of construction, must be subordinated to "before the people:" cf. *Edwards* v. *Hodges*. (3) "At" and "before" are not words of a very determinate sense: see Coverdale's Works, Parker Society, p. 471. A Lasco's Opera, vol. ii. p. 163, ante mensam instructam, and the Welsh Prayer Book. [He referred also to the 82nd Canon.] "Before the people" when the sense is ascertained by extrinsic evidence (see *Shore* v. *Wilson* (1)), is found to mean "in the sight of the people."

Thirdly, as to wafers. Primâ facie evidence was given by the respondents, that the thing in question was a wafer; it was for the other side to prove its exact constitution or substance, but no

(1) 9 Cl. & F. 356.

(2) Law Rep. 2 P. C. 382.

(3) 15 C. B. 484.

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question was raised about it at the trial. Superstition is connected with the wafer, as appears from the words of the rubric, i.e., with its state and appearance. "It shall suffice," must be taken to be imperative; dissension otherwise would not be avoided. As to Elizabeth's Injunctions ordaining wafer-bread, the 26th section of her Act under which they were made, gave power to add rites and ceremonies, but not to alter them; see Hargrave's State Trials, 13th day, at p. 899.

Fourthly, as to the crucifix. It is said on the other side, that the Roman Catholic doctrine involves the worship of the image; see citation from the Council of Trent (1), and Catechism of the Council of Trent, pt. 3, c. 2, question 24, shewing that honour is to be referred to the prototype. [He referred to *Liddell* v. *Westerton* (2) and contended that if this had been a cross and not a crucifix, it was clearly attended with very different feelings from a mere architectural decoration, and should be removed.]

Sir James Stephen, Q.C., replied. It is said that the vestments complained of are sacrificial vestments; in *Sheppard* v. *Bennett* (3) it was held legal to teach the doctrine with which sacrificial vestments are connected. As to the First Prayer Book of Edward VI., see reference in 5 & 6 Edw. 6, to the earlier Act containing that book. The Book of Elizabeth revived the first book of Edward VI., for some purposes, and the second for others. Compare the Communion Service of the three books. See Latimer's Remains, Parker Society, p. 483. As to the Injunctions, the 30th refers to a man's common dress. They were issued to carry out the Prayer Book; and it cannot be that the one by its rubric obviously prescribed cope, chasuble, alb, and tunicle, while the other contemporaneously condemned them as monuments of superstition and idolatry. The distinction between plain copes and superstitious copes is not established, and the appellant repudiates it; and indeed the argument on the other side was, that these things were destroyed because they were superstitious, and then that they must have been superstitious because they were destroyed. A certain number of copes, however, survived in Durham Cathedral, and were used till Bishop Warburton objected

(1) Law Rep. 1 P. D. 352. (2) Moore's Special Report, p. 159.
(3) Law Rep. 3 A. & E. 256.

to them in the last century; again, see Parochial and Family History of the Deanery of Trigg Minor, in the county of Cornwall, 1870, part 2, p. 341. As to the alb being a sacrificial vestment, see First Prayer Book of Edward VI. (Keeling, p. 229), and the Rubric of 1549 which refers to a service similar to that at the present day, where there is no consecration and no Communion, and where the alb is worn. As to the argument that there must have been an Ecclesiastical Commission prior to that of July, 1559, see Act of Supremacy, ss. 17, 18. It was the Commissioners appointed thereunder whose consent was necessary to the validity of a further order. The Injunctions do not profess to be made by the Ecclesiastical Commissioners or with their consent. Moreover, they are very nearly a copy of those of Edward VI., see especially, 23rd Injunction. Like those injunctions, they are merely an administrative act, and cannot be regarded as a further order under the statute: see *Phillpotts* v. *Boyd.* (1)

[*Shaw*, referred to p. 461.]

The Advertisements were not issued by royal authority or with royal assent: see the letter at their head, and Queen to Parker, Parker, Corresp. p. 223; Parker to Grindal, 28 March, 1566; Parker, Corresp. pp. 272, 273: see also State Papers, Domestic, Elizabeth, vol. xxxix. No. 76; Parker to Grindal, Parker, Corresp. p. 134.

[THE LORD CHANCELLOR:—Do you say that sect. 25 of 1 Eliz. is repealed by the Act of 1662?]

No; it is cumulative with the Act of 1662, sect. 24 of which expressly saves it; but the part of it which refers to ecclesiastical commissions is spent. Then as to the Canons of 1604, James I.'s Prayer Book, issued under letters patent reciting the proviso at the end of the Act of Uniformity, was an execution of the parliamentary authority. The proclamation which followed, specified certain alterations, republishing in substance Edward VI.'s Prayer Book.

[LORD SELBORNE. The existing Prayer Book was left as it was before.]

No; the alterations were a further order; but the republication of Elizabeth's Ornaments Rubric shewed that that rubric was still in force and amounted to a re-enactment of it, and pro tanto, a

(1) Law Rep. 6 P. C. 457.

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repeal of the Advertisements, if they are to be regarded as a further order. The canons could not be a further order; if they be, they have parliamentary authority, and in that case, bind the laity: see *Middleton* v. *Crofts*. (1) Then as to the Rubric of 1662, *Liddell* v. *Westerton* (2) decided whether there could be any ornament of the church which was not in use by authority of parliament in 2 Edw. 6. Ornament was defined in such a way as to include dresses of the minister. The ratio decidendi went further than the decision, and implied that everything which could be worn in 2 Edw. 6 could now be worn.

[THE LORD CHANCELLOR. What are the words in the Act of 1662, which you consider make the rubric as to ornaments a part of the Act itself?]

The Prayer Book, including all the rubrics, is scheduled; and see sections 2 and 24.

As to the eastward position, if the contention that the table is illegally placed is correct, it cuts away all argument, and it is impossible to say what position in respect of it is illegal. The appellant at all events stood at what would have been the north side, had the table been in its alleged legal position. "Before the people" merely meant that there should be no reservation of the Sacrament, no carrying it about; it does not mean "in the sight of the people" applied to the manual acts.

With regard to wafer-bread, it was the practice of the Church at the time of Hooker, and there is no suggestion that the wafer in this case was anything but bread. As to the crucifix, it ought not to be interfered with till it is abused, or there is reason to suppose that it will be abused.

Cur. adv. vult.

May 12. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. The appeal of *Ridsdale* v. *Clifton*, in which their Lordships have now to state the recommendation which they propose humbly to make to Her Majesty, is an appeal to Her Majesty in Council brought by the Rev. Charles Joseph Ridsdale, clerk, incumbent, or perpetual curate of St. Peter, Folkestone, against an order or decree pronounced by Lord

(1) 2 Atk. 650. (2) Moore's Special Report, 519.

Penzance, as judge or official principal of the Arches Court of Canterbury, on the 3rd of February, 1876.

This judgment specified various matters, as to which it declared that the appellant had offended against the laws ecclesiastical; but the appeal is brought in respect of four only of these matters, and it is to these only that the observations of their Lordships need be directed.

The four matters as to which the appeal complains of the judgment are these:—

1. The wearing during the service of the Holy Communion of vestments known as an alb and a chasuble.

2. The saying the prayer of consecration in the service of the Holy Communion, while standing at the middle of the west side of the communion table, in such wise that the people could not see the appellant break the bread or take the cup into his hand.

3. The use, in the service of the Holy Communion, of wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is usual to be eaten.

4. The placing and unlawfully retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave.

There were eight other charges against the appellant, as to all of which he was admonished by the learned judge, but as to none of which is there any appeal.

Of the four charges which are the subject of appeal, the three first were considered by the learned judge to be covered by the decision of this Committee in the case of *Hebbert* v. *Purchas* (1), and by the order of Her Majesty in Council made in that case; and as to them he did not exercise any independent judgment.

The fourth charge, as to the crucifix, the learned judge did not consider to be covered by authority otherwise than indirectly and by implication.

Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of this tribunal between other parties, and an order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. If the case of

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Hebbert v. *Purchas* (1) is to be taken as absolutely conclusive of every other case with the same or similar facts, there can be no doubt that the decision of the learned judge on the first three heads, being in accordance with that of *Hebbert* v. *Purchas* (1) was correct.

In *Hebbert* v. *Purchas* (1) the defendant did not appear, either before the Dean of Arches or before the Judicial Committee; but, after the decision of the Judicial Committee was pronounced against him, he presented a petition praying for a rehearing.

The Judicial Committee, to whom that petition was referred, were of opinion that to have granted such an application would have been to violate the spirit of the 2 & 3 Wm. 4, c. 92, which transferred the powers of the Court of Delegates to the Sovereign in Council, and provided that every judgment, order, and decree should be final and definitive, and that no commission should thereafter be granted or authorized to review any judgment or decree made under that Act.

All that this decided was the finality of that judgment inter partes, and the propriety of its being held final in that case was the more obvious from the fact that a defendant not appearing in the primary Court or on the appeal might be supposed to be lying by, taking the chance of a decision in the first instance, and then trying to get rid of it when it turned out to be unfavourable.

The present case, however, raises the question of finality not inter partes, but as against strangers.

In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties.

The law as to rights of property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the composition of the law, and the dealings of mankind are based upon a reliance on such decisions.

Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in

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all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation.

Their Lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules, the stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to holy orders.

On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions; and in proceedings which may come to assume a penal form, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject.

It is further to be borne in mind that in the case of *Hebbert* v. *Purchas* (1) the Judicial Committee, although they had before them a learned and able judgment of the then Dean of Arches in favour of Mr. Purchas on the points now raised, had not the advantage of an argument by Mr. Purchas' counsel on those points.

These considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in *Hebbert* v. *Purchas* (1), yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from those reasons, to decide upon their own view of the law.

Their Lordships will now proceed to consider the first charge against the appellant, namely, that of wearing an alb and chasuble. They will, however, premise that they do not propose to express any opinion upon the vestures proper to be worn by bishops, as to which separate considerations may arise; and in referring to the dress of the parochial clergy they will, for greater convenience, use the term "vestments" for the purpose of denoting the alb and chasuble or cope, as distinguished from the surplice.

The argument of the appellant on this head, which was very clearly and very forcibly stated, may be thus summed up. The Ornaments Rubric, he contends, in the revised Prayer Book of

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1662, is now the only law as to the vesture of the clergy. It contains within its one sentence all that is now enacted upon that subject. It sweeps away all previous law as to the vesture of the clergy, whether that law was to be found in statute, canon, injunction, or otherwise. It authorizes the use of all ornaments which had the parliamentary authority of the First Prayer Book of Edward VI. The vestments in question are among the ornaments which had this parliamentary authority, therefore it authorizes the use of the vestments in question.

To this reasoning, if the first proposition in the series be correct in point of fact and law, no exception could, probably, be taken. Their Lordships, however, are unable to accept that proposition. They are of opinion that it is a misapprehension to suppose that the rubric note of 1662 as to ornaments was intended to have, or did have, the effect of repealing the law as it previously stood, and of substituting for that previous law another and a different law, formulated in the words of that rubric note, and of thus making the year 1662 a new point of departure in the legislation on this subject.

Before, however, proceeding to trace the history of the law, their Lordships must observe upon the expression in the argument which asserts that the Ornaments Rubric "authorizes" the use of the vestments in question. In the opinion of their Lordships, if the only law as to the vesture of the clergy is to be found in the Ornaments Rubric, the use of the vestments of the First Edwardian Prayer Book is not merely authorized, it is enjoined. It is not an enactment ordering the accomplishment of a particular result, and suggesting or directing a mode by which the proposed result may be attained. The sole object of the rubric is to define the mode of performing an existing ministration. If the rubric is taken alone the words in it are not optional, they are imperative; and every clergyman who, since 1662, has failed, or who may hereafter fail, to use in the administration of the Holy Communion, the vestments of the First Edwardian Prayer Book, has been, and will be, guilty of an ecclesiastical offence rendering him liable to heavy penalties. Any interpretation of the rubric which would leave it optional to the minister to wear or not to wear these vestments, not only would be opposed to the ordinary principles of construc-

tion, but must also go to the extent of leaving it optional to the minister whether he will wear any official vesture whatever. If the rubric is not imperative as to the alb, and the chasuble or cope, in the Communion Office, it cannot be imperative as to the surplice in the other services, or any of them.

It is necessary now to ascertain the state of the law before the Act of Uniformity and Rubric of 1662; and then to examine whether any and (if any) what alteration was made by that Act and rubric.

In the First Book of Edward VI. (1549), the directions as to the vestures of the ministers officiating in the public services of the church (omitting all that relates to hoods and the directions as to bishops) were as follows:—

In the saying and singing of matins and evensong, baptizing and burying, the minister was to use a surplice. In the administration of the Holy Communion the celebrant was to "put upon him a white albe plain, with a vestment or cope," and the assistant-ministers (priests or deacons) were to "have upon them likewise the vestures appointed for their ministry, namely, albes with tunicles."

These directions were omitted from the Second Book of King Edward (1552); and, instead of them, a rubric was inserted, immediately before the order for Morning Prayer, in these words:—

> And here it is to be noted, that the minister, at the time of the Communion, and at all other times in his ministration, shall use neither alb, vestment, nor cope; but . . . . being a priest or deacon, he shall have and wear a surplice only.

This book was "annexed and joined" to the statute 5 & 6 Edw. 6, c. 1, and was established as law thereby.

King Edward died within a few months after the time appointed for this statute to take effect, and the re-action under Queen Mary followed. Upon the accession of Queen Elizabeth, the legislature, reverting to the state of matters which had existed when the Second Book of Edward was introduced, determined at once to restore the Liturgy and offices of religion contained in that book, with a few specified alterations, but to leave the question of the vestures of the ministers of the church open for further consideration. The natural course under these circumstances was

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that adopted, viz., to "retain" the use of the vestures which had been authorized before 1552, until a final settlement of that question could conveniently be made.

No new or revised Prayer Book was annexed to Queen Elizabeth's Act of Uniformity (1 Eliz. c. 2); but the Second Book of King Edward, "with the alterations and additions therein, added and appointed by this statute" (viz., "one alteration or addition of certain lessons to be used on every Sunday in the year, and the form of the Litany, altered and corrected, and two sentences only added in the delivery of the Sacrament to the communicants," as specified in the 3rd section), was directed to stand and be in full force and effect from the 24th of June, 1559.

The enactment, however, that the Second Book of King Edward was to be used, with these alterations and additions, "and none other or otherwise" (s. 3), was further qualified by the provisoes contained in the 25th and 26th sections, of which the former is in these words:—

> Provided always, and be it enacted, that such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of King Edward the Sixth, until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of Her Commissioners, appointed under the great seal of England for causes ecclesiastical, or of the Metropolitan of this realm.

In this manner, and not by any textual alteration of the rubrics in the Second Book of King Edward, the directions as to ornaments of the First Book were kept in force until other order should be therein taken, in the way provided by the Act.

The authorities whose duty it was to issue to the people, in 1559, a printed Book of Common Prayer, made conformable to the statute, prefixed to the book so issued by them a copy, in extenso, of the statute of Elizabeth itself; and they also of their own authority, not by way of enactment or order, but by way of a memorandum or reference to the statute, substituted a new admonitory note or rubric for the note immediately preceding the order of Morning Prayer in the Second Book of King Edward.

That note or rubric, as is pointed out by Bishop Gibson (Codex ed. 1761, p. 296), was not inserted by any authority of parliament. It was meant to be a compendious and convenient sum-

mary of the enactment on this subject. If it was an accurate summary, it was merely a repetition of the Act. If it was inaccurate or imperfect, the Act, and not the note, would be the governing rule.

It is of importance to bear in mind that the Ornaments Rubric, which it is now contended contains the whole enactment or law relating to the vesture of the clergy, was not, when originally introduced in 1559, and was not meant to be, an enactment at all; and it in fact ended with a reference to the statute 1 Eliz. c. 2, set out in the beginning of the Prayer Book, in terms which shewed that the rubric claimed no intrinsic authority for itself.

The statute, by its 25th section, had enacted that the ornaments of 1549 should be retained and be in use, but only until other order should be therein taken, by the authority of the Queen, with the advice therein mentioned. The enactment was therefore in its nature provisional, and prepared the way for the subsequent exercise of a power reserved to the Queen. If that power was not exercised, the enactment in the 25th clause would remain absolute. If the power was exercised, the order made under the power would not be an order in derogation or by way of repeal of the Act; but the order would be in pursuance of and read into the Act as if that which was done by virtue of the reserved power had originally been enacted in the statute.

Did, then, Queen Elizabeth ever take other order within the meaning of the 25th section?

Their Lordships do not think it necessary to dwell upon the Injunctions of Queen Elizabeth, and still less upon the interpretations of those injunctions; because they cannot satisfy themselves, either that the injunctions pointed to the vestments now in controversy, or that they were issued with the advice required by the section of the Act of Parliament.

But their Lordships are clearly of opinion that the Advertisements (a word which in the language of the time was equivalent to "admonitions" or "injunctions") of Elizabeth, issued in 1566, were a "taking of order," within the Act of Parliament, by the Queen, with the advice of the Metropolitan.

It is not disputed that these Advertisements were issued with

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the advice of the Metropolitan, and, indeed, also with the advice of the commissioners of causes ecclesiastical; but it is said that they were not a taking of order by the Queen.

The Queen had in the most formal manner, by Her Royal Letters, commanded the Metropolitan and other prelates to prepare these Advertisements, directing them "so to proceed by order, injunction, or censure, according to the order and appointment of such laws and ordinances as were provided by parliament and the true meaning thereof, so as uniformity of order might be kept in every church and without variety or contention.

There was no particular form required by statute or by law in which the Queen was to take order, and it was competent for Her Majesty to do so by means of a Royal Letter addressed to the Metropolitan. The Advertisements were issued by the prelates as orders prepared under the Queen's authority.

Immediately after their issue, on the 21st of May, 1556, Grindal, Bishop of London, writes (MS. from Dom. Eliz. vol. xxxix. No. 76) to the Dean of St. Paul's, requiring him to put them in force, and stating that they were issued by the Queen's authority, and that he (Grindal) would proceed to deprive any who should disobey them. The Articles of Archbishop Parker (Card. Doc. Ann. vol. i. p. 320) speak of them as Advertisements set forth "by public authority." In 1583, in Articles presented to the Queen (State Papers, vol. clxiii. Domestic, No. 31), herself by the Archbishop and some of the bishops, they are referred to as the "Book of Advertisements," and in the margin as the "Advertisements set out by Her Majesty's authority."

Against this it is said that there is nevertheless other matter in the Parker Correspondence (lately for the first time published in a collected form, though it was partially known to some historical writers of the last century, who drew from it similar inferences), from which it ought to be inferred, as a matter of fact, that the Book of Advertisements was published without Queen Elizabeth's sanction.

Their Lordships cannot lend any countenance to the suggestion that the legitimate inference to be drawn from the tenor and language of public documents, from the acts done under them, and from the public recognition of their authority, could in any

case be controlled by expressions found in a correspondence of this character. As, however, much of the argument against the authority of the Advertisements was founded on this correspondence, their Lordships think it right to say that they draw from the correspondence, as a whole, a conclusion opposite to that in support of which it was referred to.

The first draft of the Book of Advertisements was prepared by the Archbishop and his colleagues very soon after the receipt of the Queen's letter of the 25th of January, 1564–5, in the form of an order running in the Queen's name; and it appears, from passages in several letters, that they wished the civil power to undertake as much as possible of the formal responsibility of promulgating and enforcing the proposed new order, and that they anticipated very great difficulty if without that support the principal share of the burthen should be thrown upon the ecclesiastical jurisdiction. An opposite view, however, prevailed at Court, where some of the Queen's ministers and courtiers were more favourable than she was herself to the views of the Puritans, and where it was as well understood as it was by the Archbishop that the measure would encounter much unpopularity and opposition, so far as it was contrary to those views.

It further appears that in the first draft of the book (which is printed at length in the appendix to Strype's Life of Parker, No. 28, p. 84), there were several doctrinal articles and other articles (about the temporalities of bishops, the employment of schoolmasters, and the dissolution of marriages within the prohibited degrees), which were afterwards omitted, and the legality of all or some of which, under any powers then vested in the Crown, might have been more than doubtful.

That the Archbishop knew that no new "order" could legally be taken by the sole authority of himself and his brother commissioners is abundantly clear.

When, on the 8th of March, 1564–5, he sent the first draft to Secretary Cecil to be submitted to the Queen, he wrote:—

> If the Queen's Majesty will not authorize them, the most part be like to lie in the dust for execution of our parts; laws be so much against our private doings.

That draft was not approved: he sent it again a year after-

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wards (12th of March (1565–6), with a letter containing this passage :—

> And where once, this last year, certain of us consulted and agreed upon some particularities in apparel (when the Queen's Majesty's letters were very general), and for that by statute we be inhibited to set out any constitutions without licence obtained of the Queen, I sent them to your honour to be presented. They could not be allowed then, I cannot tell of what meaning, which I now send again, humbly praying that, if not all, yet so many as be thought good may be returned with some authority, at the least way for particular apparel; or else we shall not be able to do so much as the Queen's Majesty expecteth for us to be done.

That the Archbishop, both from his communications (in every stage of this business) with the Secretary of State (whose answers to him do not appear in the correspondence), and also from personal interviews with the Queen, must have had the Queen's pleasure distinctly made known to him, is no less certain.

In a letter dated the 12th of April, 1566, he gives an account of an audience which he had on the 10th of March preceding (exactly two days before his letter of the 12th of March to Cecil), when he had explained to the Queen the difficulty of enforcing the uniformity desired by Her Majesty. "I answered, that these precise folk would offer their goods and bodies to prison rather than they would relent, and Her Highness willed me to imprison them."

In his official letter to Grindal, dated the 28th of March, 1566, inclosing the Book of Advertisements, he refers to another interview which they had both then recently had with the Queen by her own command, in which she charged them "to see her laws executed, and good orders *decreed* and observed."

In the letter which he wrote on the same 28th of March to the Secretary of State, submitting the Advertisements in their final form (together with the draft of the letter to Grindal) for approval, he says :—

> I pray your honour to peruse this draft of letter and the Book of Advertisements with your pen, which I mean to send to my Lord of London. *This form is but newly printed, and yet stayed till I may hear your advice.* I am now fully bent to prosecute this order, and to delay no longer, *and I have weeded out of these Articles all such of doctrine, &c., which peradventure stayed the book from Her Majesty's approbation, and have put in but things advouchable, and, as I take them, against no law of the realm.*

They could only be "against no law of the realm" if they were

issued by the Queen's authority. For what purpose were they sent to Cecil except to obtain that authority for their promulgation in the form and manner proposed? It is true that the words follow (which were relied upon by the appellant's counsel): "And where the Queen's Majesty will needs have me assay with mine own authority what I can do for order, I trust I shall not be stayed hereafter, saving that I would pray your honour to have your advice to do that more prudently, in this common cause, which must needs be done." Their Lordships understand by this that the Queen had determined that the new order, made with her authority and approbation, should be enforced by the Metropolitan, through the ecclesiastical jurisdiction, without aid from the Privy Council or the secular power; not that the new order itself was to be without warrant, except from the sole authority of the Metropolitan, to whom, without the authorization of the Crown, the law had given no power to make any such order.

The facts that this duty was undertaken by the Archbishop reluctantly and possibly against his own judgment, that his wishes and opinions were on several points overruled, and that the Book of Advertisements was promulgated, not in the form which he would have preferred, but in that imposed upon it by the Royal will, all tend to prove that it was promulgated in that form with, and not without, the Queen's authority.

If indeed the legal effect of the Advertisements were to be judged of (as their Lordships do not think it ought to be) by the private opinion of Archbishop Parker, there is in the correspondence distinct evidence that Parker, after the Advertisements were issued, considered them to be an execution of the statutory power. Writing to the Lord Treasurer, on the 15th of November, 1573 (Correspondence, p. 450), seven years after the Advertisements were issued, he says:—

> The world is much given to innovations, never content to stay to live well. In London our fonts must go down. . . . I do but marvel what some men mean . . . with such alteration, when order hath been taken publicly this seven years by Commissioners, according to the statute, that fonts should not be removed.

The Advertisements had ordered (Card. Doc. Ann. vol. i. p. 326) "that the fonte be not removed," and this circumstance, and the

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expressions "order taken," "this seven years," and "Commissioners" (the Advertisements having been signed by the bishops as commissioners), make it clear that Parker was referring to the Advertisements. But the Advertisements could not have been a "taking of order publicly" "according to the statute" unless they had the direct authority of the Queen.

Their Lordships now turn to the part (Card. Doc. Ann.) of the Book of Advertisements which deals with the vestures of the ministers. It is in these words:—

> In the ministration of the Holy Communion in cathedral and collegiate churches, the principal minister shall wear a cope, with gospeller and epistoller agreeably; and, at all other prayers to be said at that communion table, to use no copes, but surplices.
>
> That the dean and prebendaries wear a surplice with a silk hood in the choir; and, when they preach, to use their hoods.
>
> Item, that every minister saying any public prayers, or ministering the sacraments, or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish.

It was not seriously contended that albs or chasubles could, in any reasonable or practical sense, or according to any known usage, be worn, or could be meant to be worn, concurrently with the surplice. If, therefore, the use of the surplice, at the administration of the Holy Communion, was rendered lawful and obligatory by these "Advertisements," the use of albs or chasubles at that administration was thereby rendered unlawful.

Their Lordships do not forget that the Book of Advertisements also contains orders upon other distinct subjects not within the 25th section of the statute; as to some of which it was suggested in argument that the Queen had no legislative power. But this, whether the suggestion be well or ill-founded, is, for the present purpose, immaterial.

The proof of the subsequent reception and enforcement as law of the order established by the Book of Advertisements as to the vestures of the ministers of the Church in the administration of Holy Communion throughout the Church of England from 1566 to the Great Rebellion, and again between the Restoration and St. Bartholomew's Day in 1662, is complete.

After 1566, vestments, albs, and tunicles (copes also, in parish and non-collegiate churches) are mentioned in the official acts of

the bishops and others, performed in the public exercise of their legal jurisdiction, only as things associated with superstition, and to be defaced and destroyed. They were so treated by a Royal Commission sent to Oxford by Queen Elizabeth in 1573, and by the Visitation Articles of Archbishops Grindal and Sandys (York, 1571 and 1578); and Abbot and Laud (1611 and 1637); of Bishops Aylmer, Bancroft, and King (London, 1577, 1601, and 1612), and others. The surplice, on the other hand, in a long series of Visitation Articles (sometimes accompanied by injunctions) of not less than thirty-two archbishops and bishops, of sixteen dioceses in England, commencing with Archbishop Parker in 1567 (Card. Doc. Ann. vol. 1, p. 320), and ending with Bishop Juxon in 1640 (Second Rep. Rit. Com. p. 589), besides those of various archdeacons, is consistently treated as the vesture required by law to be used by all ministers of the Church, not only in their other ministrations, but expressly in the administration of both Sacraments. Among the most stringent in this respect are the Articles of Bishops Andrewes, Overall, and Wren. After the Restoration (if, as seems probable, the visitations of Cosin and other bishops in 1662, whose articles of that year do not expressly refer to the Act 13 & 14 Car. 2, c. 4, were held under the state of the law prior to that Act), we have not only Bishop Cosin (Works, vol. 4, pp. 509, 510) but Bishops Ironside of Bristol, Morley of Winchester, and eight others of as many dioceses (whose Articles of 1662 are stated in the appendix to the Second Report of the Ritual Commissioners to have been the same on this point with those of Morley), all administering strict inquiries, to the same effect.

This, however, is not all. There is direct proof in the same class of documents, and in others of a still more public and authoritative kind, that the Advertisements were accepted as law, as having the Queen's authority.

In a visitation held in 1569, Bishop Parkhurst, of Norwich, inquired (not expressly mentioning the surplice), "Whether your Divine Service be said or sung in due time and reverently, and the Sacraments duly and reverently ministered in such decent apparel as is appointed by the laws, the Queen's Majesty's Injunctions, and other orders set forth by public authority in that behalf?" That

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he was referring to the Advertisements, and "by public authority" meant the authority of the Queen, seems clear from one of his Injunctions to the clergy (the fourth), at the same visitation, about perambulations, where he orders the clergy, on those occasions, not to use surplices or superstitious ceremonies, "but only give good thanks, and use such good order of prayers and homilies as be appointed by the Queen's Majesty's authority in that behalf." The use of homilies at perambulations was prescribed, not by the Injunctions of 1559, but by the Advertisements.

Bishop Cox, of Ely, in his Injunctions issued between 1570 and 1574, directed "that every parson, vicar, and curate shall use in the time of the celebration of Divine Service to wear a surplice, prescribed by the Queen's Majesty's Injunctions and the Book of Common Prayer; and shall keep and observe all other rites and orders prescribed in the same Book of Common Prayer, as well about the celebration of the Sacraments, as also in their comely and priestly apparel, to be worn according to the precepts set forth in the book called Advertisements." And, in his accompanying Articles, he inquired, "Whether any, licensed to serve any cure, do not wear at the celebration of the Divine Service and Sacraments, a comely surplice, and observeth all other rites and orders prescribed in the Book of Common Prayer, and the Queen's Majesty's Injunctions, and in the Book of Advertisements?"

Archbishop Grindal, in his Gloucester Articles of 1576, ordered the clergy "not to oppose the Queen's Injunctions, nor the Ordinations, nor articles made by some of the Queen's Commissioners" (naming those who subscribed the Advertisements), "January the 25th, in the seventh year of the Queen's reign." (The date is that of the Queen's letter mentioned in the Advertisements, not that of the promulgation of the book itself.) This alone seems to have been thought by Strype (Life of Parker, vol. i. p. 319 (an historian sometimes cited for a contrary purpose)) sufficient proof that the Queen must in the end have authorized the publication of the Advertisements.

Archbishop Whitgift, in his celebrated Articles of 1584 (Card. Doc. Ann. vol. 1, 413), enjoined "that all preachers and others in ecclesiastical orders do at all times wear and use such kind of

apparel as is provided unto them in the Book of Advertisements and Her Majesty's Injunctions, anno primo."

Bishop Thornborough of Bristol, in 1603, inquired "Whether at any time, and during the whole celebration of Divine Service and ministration of the Sacraments, in every your churches, your parson, vicar, or curate doth wear a surplice, according to the terms and statutes of this realm of England in that behalf provided; and how often default hath been made herein, and by whom?" In another Article, as to perambulations, he inquires whether the clergy say "the prayers and suffrages appointed" for that ceremony, "according to the late Queen's Majesty's Injunctions in that behalf provided, and according to the Book of Advertisements?"

The Book of Advertisements was referred to as of legal authority in several of the Canons of 1571; shewing (though those canons were not confirmed by the Crown, nor, apparently, ever put in force) the sense and understanding at that time, while the matter was still recent, of the bishops and clergy of the whole Church of England represented in the Convocations of both provinces. The 24th and 25th Canons of 1603–4 repeated, with express reference to the Advertisements, as already containing the rule to be followed ("according to the Advertisements published anno 7 Eliz." Juxta Admonitiones in Septimo Elizabethæ promulgatas) the substance of the directions contained in the Advertisements, as to the use of surplices, &c., in cathedral and collegiate churches; and the 58th Canon, which relates to the use of surplices at the administration of the Holy Communion in parish churches, followed, with scarcely any variation, the exact words of the Advertisements on the same subject.

The Convocations which passed those Canons thought them consistent with others (the 14th, 16th, and 56th), which enjoined the strictest possible conformity with the orders, rites, and ceremonies prescribed by the Book of Common Prayer, without addition, omission, or alteration; a view quite sound and correct, if the Advertisements were a legal exercise of the statutory power given to the Crown by 1 Eliz., c. 2, s. 25; but, on the contrary supposition, erroneous and untenable. The Canons of 1603–4 received the Royal Assent; so that on that occasion there was

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the most formal, solemn, and public concurrence possible, of the Crown and the Convocation of both Provinces, in that understanding of the law, which had been acted upon for nearly fifty years by all the executive authorities of the Church. The Canons of 1640 (also confirmed by the Crown), which mention "Queen Elizabeth's Injunctions and Advertisements," carry on the public evidence of the same understanding down to the time of the Great Rebellion; and the divines consulted by the Lords' Committee of 1641 (Card. Conf. 273) allege that the High Church party "pretended, for their innovations, the Injunctions and Advertisements of Queen Elizabeth," denying, indeed, that either the Injunctions or the Advertisements were in force, "but by way of commentary and imposition;" but not disputing that the Advertisements had such authority as Queen Elizabeth by law could give them.

To this it may be added that Hooker, the greatest ecclesiastical writer between 1566 and the Protectorate, describes the Advertisements as "Agreed upon by the Bishops, and confirmed by the Queen's Majesties" (Hooker's Works, by Keble, 6th ed. vol. iii. p. 587). Cosin (although in a passage which will afterwards be referred to, he appears to have at one time supposed that the conditions of the statute had not been duly complied with,) speaks of them (Works, vol. v. p. 90) as made under the Queen's reserved authority; and Wren (Parentalia, p. 75) as "Advertisements authorized by law (1 Eliz. c. 2, sect. penult.")

From all these facts, the conclusion drawn by this committee in *Hebbert* v. *Purchas* (1), that the Advertisements of Queen Elizabeth on this subject had the force of law under 1 Eliz., c. 2, s. 25, appears to their Lordships to be not only warranted, but irresistible.

Nor is the weight of these facts diminished by the circumstance (which was, in the opinion of their Lordships, established by the appellant's counsel), that the extensive destruction of albs, vestments, and copes, mentioned in Mr. Peacock's book, and spoken of in the judgment of *Hebbert* v. *Purchas* (1) as if it had been later than the promulgation of the Advertisements, really preceded that event. The same causes which had led to the destruc-

(1) Law Rep. 3 P. C. 605.

tion, irregularly and without law, of a particular kind of ornaments, as to which the law, in its then provisional state, was at variance with the sentiment of the moderate, as well as of the extreme, section of the clergy of the Reformed Church, would naturally suggest the expediency of taking such order, upon the first convenient opportunity, as would give legal sanction to the disuse of those ornaments.

Reading, then, as their Lordships consider they are bound to do, the order as to vestures in the Book of Advertisements, into the 25th section of 1 Eliz., c. 2, and omitting (for the sake of brevity) all reference to hoods, it will appear that that section, from the year 1566 to 1662, had the same operation in law as if it had been expressed in these words:—

> Provided always that such ornaments of the Church and of the ministers thereof shall be retained and be in use as were in this Church of England by authority of parliament in the second year of King Edward VI., except that the surplice shall be used by the ministers of the Church at all times of their public ministrations, and the alb, vestment or tunicle shall not be used, nor shall a cope be used except at the administration of the Holy Communion in cathedral and collegiate churches.

It is clear that, during the whole of this period, except during the interregnum of the Civil War and the Protectorate, when the Episcopal Government of the Church and the use of the Liturgy were interrupted, this state of the law was generally understood, acted upon, and enforced by authority. It is also clear that throughout this long period the Ornaments Rubric, as originally printed in the Prayer Book of Queen Elizabeth, was allowed to remain unaltered. This, then, being the state of the law up to and in 1662, and the Ornaments Rubric, up to and at that time, not being in any sense a complete and independent enactment, but being merely a reference to an external law, namely, the statute of 1 Eliz., c. 2, the question has now to be asked, was it the intention, and was it the effect of the alteration in the Ornaments Rubric in 1662, to repeal the 25th section of the statute of Elizabeth, and all that had been done under it, and to set up a new and self-contained law on the subject of ornaments?

The history of the revision of the Prayer Book is strongly opposed to such a conclusion.

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The Puritans, in their 18th "General Exception," at the Savoy Conference, stated various objections of principle to ceremonies in the church, especially as to three matters: (1) the surplice; (2) the sign of the cross in baptism; and (3) kneeling at the Holy Communion. Following up their general "exceptions" with objections in detail to particular parts of the Book of Common Prayer, they said, commenting on the Ornaments Rubric, as it stood before the revision of 1662, "Forasmuch as this rubric seemeth to bring back the cope, albs, &c., and other vestments forbidden by the Common Prayer Book, 5th and 6th Edward the Sixth, and for our reasons alleged against ceremonies under our 18th General Exception, we desire it may be wholly left out."

Baxter (History of Life and Times, p. 155) seems to treat the objection as having been founded on the words in the rubric "at the time of the Communion." "They excepted," he says, "against that part of the rubric which, *speaking of the Sacraments to be used in the church*, left the room to bring back the cope, albe, and other vestments."

The words, "seemeth to bring back," assumed that those vestures of the First Book of King Edward were not practically in use under that rubric. The words did not suggest—and they would have been erroneous if they had suggested—more than that the rubric had the appearance of giving them some legal authority. The real substance of the objection was in reference to the 18th General Exception, and in the request that the whole rubric might be omitted, with the object, manifestly, of getting rid of the surplice. The bishops do not appear to have considered the suggestion about "seeming to bring back," &c., worthy of particular notice. It would have been easy to answer it by shewing that, under the statute to which that rubric referred, the surplice had been legally substituted for the albs, &c. But knowing that the surplice itself was the only thing really in controversy, they contented themselves with saying: "For the reasons given in our answer" (in which they had defended ceremonies generally, and the surplice particularly, but had said nothing about copes, albs, or vestments) "to the 18th General Exception to which you refer us, we think it fit that the rubric continue as it is."

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Although the bishops would not yield on this point, it could not have been their intention, when they "thought it fit that the rubric should continue as it was," to abolish the use of the surplice, and restore the ancient vestures, in any office in which, as the law then stood, the surplice was the vesture proper to be used. No one who holds in respect the memory of the Ecclesiastical Legislature of that day (whose revision of the Prayer Book was accepted by Parliament, almost *sub silentio*) could impute to them a deliberate intention covertly to alter the substance of the law as to the vestures of the clergy (which they had in the conference declared their intention to leave unchanged), by changes apparently verbal and trivial, in a rubric possessing down to that time no legislative authority, and on which they themselves, as will be seen in the sequel, never meant to act, and never did act, in any such sense.

The declarations of the legislature which bear upon this question are (1) the recitals in the preamble of the Act of 1662, and in the second section of that Act; and (2) the preface to the Prayer Book.

The preamble of the Act of 1662 recites that the commission on which the annexed book was founded had been ordered "for settling the peace of the Church, and for allaying the present distempers, which the indisposition of the time had contracted."

The restoration of vestures which had not been in use for nearly a hundred years, and had become associated, not in the popular mind only, with the idea of superstition, cannot well be supposed to have been contemplated by the legislature as a change conducive to the peace of the Church, or to agreement within its pale, even when that pale might have been contracted by the secession of those from whom conformity was not to be looked for. And if it had been intended not merely to continue an existing and well-known state of things, but to revive usages long obsolete, and to prohibit all things previously in legal use, which were not prescribed by the First Book of King Edward, it can hardly have been expected that the desired certainty of rule, and agreement in practice, would have been attained by a vague reference to a Prayer Book not generally accessible.

Of the "Preface" to the Book of 1662 it is to be observed

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(1) that it disallows, as without warrant in law, the practical interruption, during the Rebellion and the Protectorate, of the use of the Liturgy, "though enjoined by the laws of the land, and those laws never yet repealed;" (2) that none of the general reasons thereby assigned for the revision, and for the alterations then made, are such as to make it at all probable that for any of those reasons the old vestures would be restored; and (3) that a comparison of the new language with the old is thereby expressly invited, for the purpose of arriving at a just view of the reasons for particular changes: "If any man, who shall desire a more particular account of the several alterations in any part of the Liturgy, shall take the pains to compare the present book with the former, we doubt not but the reason for the change may easily appear."

Entering then upon the comparison so invited, the first material observation is that, on the one hand, the statute 1 Eliz. c. 2, is reprinted at the beginning of the book as an unrepealed and effective law, and, indeed, is transcribed in the manuscript book approved and signed by the two Convocations; and, on the other hand, the Ornaments Rubric of 1662 occupies the same place, and primâ facie retains the same general office and character which it had in the former book, in which (as has been already said) it was a note of reference to an external law, namely, that contained in the 25th section of the statute, still printed at the beginning of the book. Their Lordships cannot look upon this rubric as being otherwise than what it was before, a memorandum or note of reference to that law. Except for its new parliamentary authority (which is a matter scarcely entering into the comparison of the old with the new language), it would certainly be so. It is true that the former express reference to the Act of Elizabeth at the end of the rubric is omitted. But, on the other hand, the Act itself is exhibited as a law still in force, and the effect and the obvious purpose of all the changes in the wording of the rubric (with a single exception) is to make it, as far as it goes, a mere extract from, and a simple repetition of the words of, that Act. The important words of the Act, "until other order shall be therein taken," &c., are not now for the first time left out; the former rubric had also stopped short of them when it could not possibly control their legal effect. If the manuscript alterations

in the handwriting of Sancroft acting as Cosin's secretary (much dwelt upon by the appellant's counsel), could for this purpose be accepted as evidence, they would prove, as a matter of fact, that the change was made because (in the language of the manuscript) "these are the words of *the Act itself*." Their Lordships do not think that such evidence is admissible; but the same reason is legitimately to be inferred from the comparison suggested by the preface to the Prayer Book. It is easy to understand why the words of the Act should be as closely as possible adhered to, if those words, as found in that Act, were still the law authoritatively governing the matter. The words "shall be retained and be in use" were not in the former rubric, but they were in the statute. If intended as a mere extract from the statute, or to continue and carry forward in 1662 the use of those things which were then actually, or in contemplation of law, in use under that statute, they are apt and appropriate; but if it was meant to bring back an old and long-disused state of things, by making the Rubric of 1662, for that purpose, a new point of departure, which repealing the 23th section of 1 Eliz. c. 2 and all that had been done under it, the substitution of this particular language for the words of the former rubric, "the minister shall use," &c., and the recurrence to the exact phraseology of the enactment about to be superseded, would seem to be the most inappropriate way conceivable of accomplishing that object.

The only other alteration (which is also the single deviation in the Rubric of 1662, as far as it goes, from the language of the 25th section of 1 Eliz. c. 2), is this. In that section the words were, "such ornaments of the Church and of the ministers thereof shall be retained and be in use as was in this Church," &c. The rubric in use before 1662 was that of 1559, as reprinted in the Book of 1603–4, which said: "The minister, *at the time of the Communion, and at all other times in his ministration,* shall use such ornaments in the Church as were in use," &c. In the Rubric of 1662 they are, "such ornaments of the Church, and of the ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church," &c.; the words, "*at all times of their ministration,*" being interpolated into the context, of which the rest is extracted from the Act of Elizabeth. What is the reason for this change, dis-

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coverable (according to the rule of the preface to the Prayer Book) from a comparison of the new language with the old? The old language (i.e., that of the former rubric) seemed to imply a distinction which really existed when it was used in 1559, between the ornaments of the minister at the time of the Communion and his ornaments at other times in his ministration, and the objection at the Savoy Conference as understood by Baxter (than whom no one was better acquainted with all that passed) seems to have been to an apparent recognition or admission of this distinction. That distinction, in all parish and non-collegiate churches, had been abolished by the Advertisements and the practice under them. The new words (though not incapable of being read distributively, if and so far as such a distinction might still continue in law), ceased to imply, or to seem to imply, any such distinction. If the words of the statute had been in this place simply followed, there would have been less force in the alteration; but these words "at all times of their ministration," are put in as if to give emphasis to the change, and to direct attention to the fact that, in the then state of the law, the use of the same vestures by the minister, at all times of his ministration, was the ordinary and the general rule. Such a change of language here would have been most extraordinary if it had been intended to recur in all the churches of the kingdom to those distinctions to which the Advertisements had put an end, but which the terms of the former rubric seemed to recognise. On the other hand, it was a natural change of language, if the object was to remove some part, at least, of the ground for the Puritan objection, that the former rubric "seemed to bring back" the abolished vestures.

This explanation of the change is, in fact, the only one which is in harmony with or which could justify the note or list of alterations in the book now deposited in the Library of the House of Lords, "out of which was fairly written" (Lords' Journal, April 10, 1662) the Book of Common Prayer subscribed on the 20th of December, 1661, by the Convocations of Canterbury and York, and which book, so subscribed, was by those Convocations "exhibited and presented" to the King, and sent by the King to the House of Lords on the 25th of February, 1661–2. This original book, from which the transcript was thus made, contains

the actual record of all alterations and additions made by the Convocations, clearly written in manuscript into a printed Prayer Book of 1636, and at the beginning a tabular list of the material alterations. It was delivered by the House of Lords to the House of Commons as the authority for the book "fairly written" which was to be referred to in the Act (Lords' Journal, April 10, 1662); and it is impossible to doubt that the tabular list of alterations contained in it was inserted for the purpose of enabling the changes which Parliament was asked to sanction to be well understood. This tabular list sets out in parallel columns all the material changes which had been made from the old form, among which no mention of the rubric in question occurs, and there is then a note added in these words: "These are all ye materiall alterations ye rest are only verbal, or ye changing of some Rubricks for ye better performing of ye Service, or ye new moulding some of ye Collects."

To repeal in 1662 the 25th section of the statute of 1 Eliz. and the order taken under its authority, would have required either a clear and distinct repealing enactment or an enactment inconsistent and irreconcilable with the former law. It was admitted in the argument, and indeed could not be denied, that the statute of Elizabeth was not repealed in terms; and it is in fact, as has been already observed, set forth as the first enactment in the new Prayer Book. The statute is also beyond question one of those "good laws and statutes for the uniformity of prayer and administration of the Sacrament," which by the 24th section of the Act of 1662 are declared to "stand in full force and strength, to all intents and purposes whatsoever for the establishing and confirming" of the new book, and which are thereby directed to be "applied, practised, and put in use for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other."

In order to judge whether there is anything inconsistent and irreconcilable between the Ornaments Rubric in the new Prayer Book and the 25th section of the older statute, that section must be read as if the order taken under the section had been inserted in it. And, as so read, their Lordships see nothing inconsistent between the rubric and the section. The rubric served, as it had

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long previously served, as a note to remind the Church that the general standard of ornaments, both of the Church and of the ministers, was to be that established by the authority of parliament in 1542; but that this standard was set up under a law, still unrepealed, which engrafted on the standard a qualification that, as to the vestures of parish ministers, the surplice, and not the alb, vestment, or tunicle, should be used.

No doubt can be entertained that for nearly two centuries, succeeding 1662, the public and official acts of the bishops and clergy of the Church, and of all other persons, were inconsistent with the supposition that the Rubric of 1662 had made any change in the law.

During the twenty-five years immediately succeeding the legislation of 1662, we have a series of Visitation Articles (those of fifteen bishops and one archbishop, of thirteen dioceses, printed either at length or by collation with Bishop Morley's form, in the Appendix to the Second Report of the Ritual Commissioners, pp. 609, 611, 615, 632, 639, 642, 645, 649, 653–4), which prove conclusively that those whose official duty it was to see the law observed, and of whose strictness in the performance of that duty the same articles supply abundant evidence, understood the law still to be that the surplice was always to be used by the clergy officiating in the administration of the Holy Communion.

This list does not include any articles of the year 1662, except those of Bishops Hacket of Lichfield and Henchman of Salisbury, who both expressly refer to the Act of Uniformity of that year. Upon the point in question, Bishop Hacket inquires in 1662, thus:—

> Have you a decent surplice, one or more, for your parson, vicar, curate, or lecturer to wear in the time of all public ministrations? Hath he read the Book of Common Prayer as it is enjoined by the late Act of Uniformity for public prayer, administration of the Sacrament, &c., on some Sunday before the 24th of August last past, and did and doth he wear the surplice while he performed that office and other offices mentioned in that Common Prayer Book? Ibid. p. 609.)

Bishop Henchman (Ibid. p. 611) inquires:—

> Doth your minister, reading Divine Service, and administering the Sacraments and other rites of the Church, wear the surplice according to the canons?

Subsequently, in 1663, 1664, 1666, 1671, 1672, 1674, 1676,

1677, 1679, 1683, and 1686, articles to the same effect, in different forms, but all equally cogent, were administered by the other prelates, whose visitations have been referred to. Bishop Morley's form, adopted by nine other prelates in those years, and used by himself in 1674 (as he and nine others had also used it in 1662, when the form of the revised rubric had been settled by the two Convocations, but before it became law), is this:—

Art. 5 (concerning churches, &c.):—Have you a comely, large surplice for the minister to wear at all times of his public ministration in the church?

Art. 7 (concerning ministers):—Doth your minister, at the reading or celebrating any Divine Office in your church or chapel, wear the surplice, together with such other scholastical habit, as is suitable to his degree? (Ibid. p. 615.)

Bishop Henchman, in 1664 (then translated to London), and Bishop Pearson of Chester, in 1674, used this form:—

Art. 7 (concerning churches, &c.):—The same as Bishop Morley's.

Art. 4 (concerning ministers):—Doth your minister, in the morning and evening service, in the administration of the Sacraments and in performing other religious offices appointed by the Church of England, use the respective forms in the Book of Common Prayer, together with all those rites and ceremonies which are enjoined in this Church; and doth he make use of the surplice when he reads Divine Service or administers the Sacraments? (Ibid. pp. 632, 642.)

Bishops Morley and Henchman were two of the three prelates (Archbishop Sheldon being the third) who are stated by Baxter (Life and Times, pp. 171–2) to have "managed all things" at the Savoy Conference. Archbishop Sheldon, in his circular letter to the officials of his diocese in 1670 (Card. Doc. Ann. vol. ii. pp. 276–2) directs them to require that all parsons, vicars, and curates, "in the time of their officiating, ever make use of and wear their priestly habit, the surplice and hood."

Archbishop Sancroft, in 1686, also used Bishop Morley's form under the head "Concerning Churches"; and, under that "Concerning the Clergy," his 7th Article runs thus:—

Doth your parson, vicar, or curate read Divine Service on all Sundays, and publicly administer the holy Sacraments of Baptism and the Eucharist, and perform all other ministerial offices and duties, in such manner and form as is directed by the Book of Common Prayer lately established, and the Act of Uniformity therewith published . . . . without addition, diminution, or alteration? And doth he in those his ministrations wear the surplice with a hood or tippet befitting his degree? (Ibid. p. 654.)

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It was not disputed at the bar that the subsequent practice in parish and non-collegiate churches till about 1840 or later was uniformly consistent with this view of the law.

As public declarations of what was understood to be the state of the law shortly after the completion of the revision in 1662, their Lordships may refer in the first place to the statement of Bishop Sparrow. Sparrow was Bishop of Exeter in 1684. He had been one of the Commissioners at the Savoy Conference. In 1665 he published his "Rationale" of the Book of Common Prayer, which then contained nothing as to the Ornaments Rubric or the ornaments of the minister. In 1684, after the revision, he published a new edition, and thus (p. 337) states the law as then understood:—

> The minister in time of his ministration shall use such ornaments as were in use in the 2nd Edward VI., rubric 2, viz., a surplice in the ordinary ministrations, and a cope in time of ministration of the Holy Communion in cathedral and collegiate churches.—Queen Elizabeth's Articles, set forth in the seventh year of her reign.

Their Lordships may further refer to the alterations proposed by the Commissioners of 1689 appointed to revise the Prayer Book, with a view to the relief of Dissenters (Ho. of Com. Papers, vol. xxxvi. (1854)). The rubric proposed by them to be substituted for the Ornaments Rubric may be taken to be a statement of what at that time was understood to be the state of the law:—

> *Whereas the surplice is appointed to be used by all ministers in performing Divine Offices*, it is hereby declared that it is continued only as being an antient and decent habit. But if any minister shall declare to his bishop that he cannot satisfye his conscience in the use of the surplice, in that case the bishop shall dispense with his not using it, &c.

And the "Bill of Comprehension" introduced into parliament by the King's authority about the same time contained a clause (MS. in Burnet Papers, Card. Conf. p. 457) framed on the same principle.

It is abundantly clear that, if any person had imagined that the Prayer Book of 1662 introduced a change on this subject, there were very many who would gladly have acted on it. No instance has been given of any person having acted on it. On the other hand, every one continued to act according to the old law,

although, if the argument of the appellant is correct, every one in so doing was acting illegally. The practice—consistent with the old law, inconsistent with the argument of the appellant—has been uniform, open, continuous, and under authoritative sanction.

What, then, in a question of this nature, is the weight in law of such contemporaneous and continual usage? Their Lordships may take the answer to this question from the words, either of Lord Campbell in *Gorham* v. *Bishop of Exeter* (1); or of Chief Baron Pollock in *Pochin* v. *Duncombe* (2); or of Dr. Lushington in *Westerton* v. *Liddell.* (3)

Lord Campbell, referring to a statute of 25 Henry VIII. c. 19, said:—

> Were the language of the statute obscure, instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of an old Act of parliament.

Chief Baron Pollock, with reference to the maxim, "Contemporanea expositio fortissima est in lege," said:—

> The rule amounts to no more than this, that if the Act be susceptible of the interpretation which has thus been put upon it by long usage the Court will not disturb that construction.

Dr. Lushington said:—

> Usage, for a long series of years, in ecclesiastical customs especially, is entitled to the greatest respect; it has every presumption in its favour; but it cannot contravene or prevail against positive law, though, where doubt exists, it might turn the balance.

A Church Rubric, taking the form of directions to be acted on by large numbers of persons from week to week, and from day to day, is a subject above all others for exposition by contemporaneous and continual usage, and the principles laid down in the cases to which their Lordships have referred, fortified as they easily might be by many other authorities, seem to their Lordships to be decisive of the present question.

What their Lordships have already said is sufficient to shew that, in their opinion, according to the ordinary principles of legal

(1) 15 Q. B. 73, 74. (2) 1 H. & N. 856.
(3) Moore's Special Report.

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construction and interpretation, the Ornaments Rubric of 1662, on the subject of the vestures of ministers, cannot, any more than the rubric on the same subject which preceded it, be looked at otherwise than in connection with the statute of 1 Eliz. c. 2. They may, however, also point out a singular incongruity which might arise from looking at it unconnected with the statute. The rubric states that such ornaments of the ministers, at all times of their ministration, shall be retained and be in use as were in the Church by authority of parliament in 1549, that is, under the First Prayer Book of Edward VI. But under the Book of 1549, the rubric as to the vestures in the Communion Service is confined to that office, and the general rubric at the end of the book is confined to the saying or singing of matins and evensong, baptising, and burying. There does not, therefore, appear in the Book of 1549 to be any imperative direction as to the use of the surplice or any other vesture in the Marriage Service, in the Churching of Women, or by ministers assisting the bishop in the office of Confirmation, in the Commination Service, or in the saying of the Litany, which in that book was not connected with matins or evensong. These omissions, however, were filled up by the Advertisements issued under the statute which provided that every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, should wear a comely surplice. If, therefore, the Act and the Advertisements are read in connection with the rubric, the use in the latter of the words "at all times of their ministration" may be justified: whereas those words would be inaccurate if applied merely to the Prayer Book of 1549.

The learned counsel for the appellant, in the course of their argument, placed considerable reliance on passages in certain books published during the eighteenth and in the present centuries by writers who, however learned, were not entitled to speak with any legal authority, and some of whom appear to have expressed opinions adverse to the legality of the usage as to the vestures of clergymen, which they admit prevailed up to and at the time at which they wrote.

It would, in the opinion of their Lordships, be contrary to well-settled principles of law to admit private opinions to control the legal interpretation of public documents, or the legal inferences

from public acts or usage; but it may be not without advantage to point out the circumstances under which the opinions of these writers appear to have been expressed.

One of the books referred to by the appellant's counsel was Dr. Thomas Bennett's Paraphrase, with Annotations upon the Book of Common Prayer. The second edition of this book was published in 1709, and the earlier edition (the date of which their Lordships have not observed) must have been still nearer the year 1662. Both editions were published before Cosin's Notes on the Prayer Book were printed, and their Lordships will, in the first place, refer to those notes and to the writers who followed.

Three sets of Notes on the Prayer Book (as it stood before 1662), by Cosin, were published by Nicholls in 1710, the first set being supposed to have been written by Cosin some time before, and the two others at different times after, 1630, but all before the revision of 1662.

In the first Notes (Cosin's Works, vol. v. p. 42) he had originally suggested that the clergy, as the law then stood, were "all still bound to wear albs and vestments, howsoever it was neglected;" and that the 14th and 58th Canons of 1603–4 were inconsistent with each other. But perceiving some time afterwards (at what time afterwards is uncertain) that he had, in making that Note, overlooked the terms of the statute (1 Eliz. c. 2, s. 25), he added: "But the Act of Parliament, I see refers to the Canon, and until such time as other order shall be taken."

In another passage of the same set of Notes (Ibid. p. 90), he had distinctly recognised the authority of those articles of the Advertisements which relate to this matter as a due exercise of the powers given to the Crown by that statute with reference to a point which might depend on s. 26 rather than on s. 25. "For cathedral churches," he there says, "it was ordained by the Advertisements in Queen Elizabeth's time (that authority being reserved notwithstanding this book by Act of Parliament), that there should be an epistoller and gospeller, besides the priest, &c." And, in the execution of his official duty as archdeacon of the East Riding of York, in 1627, he administered to the churchwardens then under his jurisdiction very stringent articles (not adopted without change from forms previously in use, but revised and altered under his

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own hand), in which the use of the surplice by the parochial clergy, when administering the sacraments, was treated as legally necessary, and never to be omitted: see his Correspondence published by the Surtees Society, vol. i. p. 106; and Preface; also Works, vol. ii. p. 9. In his later Notes, and also in his suggested corrections of the Prayer Book, he repeated the view which had been expressed in the uncorrected form of his first Note, giving, however, no reason for that opinion, except such as may be inferred from a passage at p. 233 of vol. v. of his Works, where, after quoting the words of 1 Eliz. c. 2, s. 25, he says: "which other order, *so qualified as is here appointed to be*, was never yet made."

From this it may be concluded that Cosin's opinion at that time was founded either on some technical view of the informality of the Advertisements, or on some conclusions as to matters of fact, with respect to which (as they involved no question of peculiar ecclesiastical learning) his authority was certainly not greater than that of any other man.

After the Restoration, Cosin was made bishop of Durham, and in his Visitation Articles of 1662, already mentioned (which may be assumed, according to the appellant's argument, to have been anterior to St. Bartholomew's Day in that year), he still considered it to be his duty to treat the use of the surplice in the administration of both sacraments as matter of legal obligation on all the parochial clergy.

The result appears to be that the opinions recorded in the private Notes of this divine, at different periods of his life, are not consistent with each other, while those of them which are adverse to the validity of the Advertisements are inconsistent with his official acts done in the exercise of a legal jurisdiction and in the discharge of his public duty both before and afterwards.

The private Notes of Cosin, however, originally written before 1662, and made known to the public half a century or more after they were written, appear to have been adopted without much examination by writers who followed. Bishop Gibson, in the Codex published in 1713, apparently echoing Cosin's words, says:—

> Which other order (at least in the method prescribed by this Act) was never yet made; and, therefore, *legally* [the *italics* are Gibson's] the ornaments of

ministers, in performing Divine Service, are the same now as they were in 2 Edw. VI.

Burn, in his Ecclesiastical Law, follows Gibson, as Gibson had followed Cosin. Dr. Cardwell, the last author cited, erroneously supposed that there was a judicial decision which had established that an instrument under the Great Seal was necessary for a due execution of the parliamentary power, and, for that reason only, he concluded that the Book of Advertisements had not the force of law (Cardwell, Confer., p. 38, note).

Their Lordships will now refer to the opinion expressed by the other author, Bennett, already mentioned, whose work was published before Cosin's Notes were made public.

He states (Paraphrases with Annotations upon the Book of Common Prayer, 2nd ed. pp. 4, 5) the Rubrics of 1549, 1559, and 1662, and then proceeds thus:—

From hence it seems to follow that the present rubric, and that of Queen Elizabeth, which are in effect the very same, do restore those ornaments which were abolished by King Edward VI.'s Second Book, and which, indeed, have been disused ever since that time. But it must be considered that in the latter part of the Act of Uniformity, 1 Eliz., there is this clause, ("*until other order*," &c.); this clause explains Queen Elizabeth's Rubric, and, consequently, the present one, which is, in reality, the same. So that those ornaments of the Church and its ministry which were required in the second year of King Edward were to be retained till the Queen (and, consequently, any of her successors), with the advice before specified, should take other order. Now, such other order was accordingly taken by the Queen in the year 1564, which was the seventh of her reign. For she did then, with the advice of her Ecclesiastical Commissioners, particularly the then Metropolitan, Dr. Matthew Parker, publish certain Advertisements, wherein are the following directions:—

[He then quotes the Advertisements, and afterwards states the Canons.]

From hence 'tis plain that the parish priests (and I take no notice of the case of others) are obliged to use no other ornaments but surplices and hoods. For these are authentic limitations of the rubric, which seems to require *all* such ornaments as were in use in the second year of King Edward's reign. Besides, since from the beginning of Queen Elizabeth's reign down to our own times, the disuse of them has most notoriously been allowed; therefore, though it were not strictly reconcileable with the letter of the rubric, yet we cannot be supposed to be under any obligation to restore the use of them. And, indeed, if that practice which our Governors do openly and constantly permit and approve be not admitted for a good interpretation of laws, whether ecclesiastical or civil, I fear it will be impossible to clear our hands of many repugnances of different kinds besides this under debate.

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It only remains to consider the bearing on this part of the present case of the former decisions of the Judicial Committee in *Liddell* v. *Westerton* (1) and *Martin* v. *Mackonochie.* (2)

As to *Liddell* v. *Westerton* (1), everything said and done in that case to which the Rubric of 1662 was material, had reference exclusively to ornaments of the Church. The Court had "nothing to do with the ornaments of the minister or anything appertaining thereto."—(Moore's Special Report, p. 31). The questions whether the power of the Crown under the 1st Eliz., c. 2, s. 25, had ever been duly exercised, and (if so) with what effect; whether the Rubric of 1662 was to be read with that section, as a law still in force, or not; what would be the effect of so reading it, and whether any aid towards the solution of those questions might be derivable from usage, either before or after 1662, and what such usage had been, were none of them before Dr. Lushington, or the Court of Arches, or the Judicial Committee. It was not suggested that anything had ever been done under the 1 Eliz. c. 2, s. 25, as to any "Ornaments of the Church." Under these circumstances it was sufficient, as well as most convenient, to refer to the rubric, and to that alone; the effect of which was, as to that matter, simply coincident and identical with that of the section in the Act of Elizabeth, assuming it to be then in force.

It is perfectly consistent that the rubric should speak with the authority of the statute, so far as the language and effect of both are identical, and yet should not supersede or control the operation of that part of the statute which it does not in terms repeat.

It is true that Dr. Lushington did, in more than one passage of his judgment, signify his assent to what he described as the "irresistible argument that the last Statute of Uniformity, by referring to the First Book of Common Prayer of Edward VI., excluded not only the Second Book but everything else effected in the interval between 1549 and 1662, whether by Act of Parliament or by Canon, which could or might have altered what existed in 1549; and, consequently, that nothing done from 1549 to 1662, however lawful during that period, had in itself force or binding authority after the statute of 1662 came into operation." Everything which

(1) Moore's Special Report, 159. (2) Law Rep. 2 P. C. 365.

fell from that very learned judge is entitled to most respectful consideration; but he had not been (as their Lordships now have been) upon the path of inquiry which was really necessary to support or to disprove that proposition.

Nothing to the same effect is to be found in the judgment of the Judicial Committee, which overruled that part of Dr. Lushington's judgment in which these dicta occur, reversing his decision and that of the Court of Arches as to the crosses not connected with the communion table; and also rejecting as erroneous his view of the meaning of the words "ornaments of the Church" as used in the rubric; which view had nevertheless been held in both the courts below to be clear and indisputable.

There is, however, in the judgment of the Judicial Committee, delivered by Mr. Pemberton Leigh, the following passage, which has been much relied on by the appellant:—

> It will be observed that this Rubric (that of 1559) does not adopt precisely the language of the statute, but expresses the same thing in other words. The statute says: "such ornaments of the Church, and of the ministers thereof, shall be retained and be in use;" the Rubric "that the minister shall use such ornaments in the Church." The rubric to the Prayer Book of January 1, 1604, adopts the language of the Rubric of Elizabeth. The Rubric to the present Prayer Book adopts the language of the Statute of Elizabeth. But they all obviously mean the same thing; that the same dresses, and the same utensils, or articles, which were used under the First Prayer Book of Edward VI., may still be used. None of them, therefore, can have any reference to articles not used in the services, but set up in churches as ornaments in the sense of decorations.

This passage has been the subject, as it appears to their Lordships, of remarkable misconception. It was sufficient for the purpose of the question as to crosses then before the Judicial Committee, to consider only the meaning of the exact words of the rubric itself, standing alone, and the words corresponding to them which were found in the Statute of Elizabeth and the Rubric of 1559; and to do this with a view only to the interpretation of the two particular phrases, "ornaments of the Church," and "by authority of parliament in the second year of the reign of King Edward VI." For that purpose of verbal exposition the statement in this passage of the judgment (with the exception of a somewhat inaccurate expression as to the Rubric of 1604) was unexceptionably correct. The words of the Rubric of 1662, standing alone, and the

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corresponding words in the Statute of Elizabeth and the Rubric of 1559 and 1604, do mean what is there stated, neither more nor less. In the Act of Elizabeth there are other and further words, the effect of which, if still in force, is in the present case very important; but in that part of the judgment of *Liddell* v. *Westerton* (1), any examination of the effect of those words, or of the questions arising out of them with reference to any ornaments of the ministers of the Church, would have been absolutely irrelevant. Judges weigh their words with reference to the questions which they have to consider, and not with reference to questions which are not before them. If what was then said could properly be applied to a purpose not then in contemplation, the statement that the words of the 25th section of the Act of Elizabeth, the Rubric of 1559 and 1604, and the Rubric of 1662, "all obviously mean the same thing," might more reasonably be alleged in proof that the Judicial Committee thought the words "according to the Act of Parliament set forth in the beginning of this book," or the words "until other order taken therein," &c., were still implied at the end of the Rubric of 1662, than the succeeding words can be relied on to shew that they held all the vestures of the clergy prescribed by the First Book of King Edward to be lawful at all the three epochs referred to—1559, 1604, and 1662.

With respect to the decision of the Judicial Committee in *Martin* v. *Mackonochie* (2) little need be said. There, too, it was sufficient to consider the effect of the mere words of the Rubric of 1662, repeating (as it did) in 1662 the language of the Act of the first year of Elizabeth, on a point unaffected by any thing done in the meantime. The points determined in *Liddell* v. *Westerton* (1) are succinctly stated, approved, and followed. There is no reference to the particular passage in the judgment of *Liddell* v. *Westerton* (1) on which the appellant's counsel rely; though, if there had been, their Lordships would have been of opinion, for the reasons already stated, that the present question would be in no way affected by it.

Their Lordships, for these reasons, which, out of respect for the elaborate arguments so earnestly addressed to them, and not from any hesitation as to the decision at which they should arrive, they

(1) Moore's Special Report, 159. (2) Law Rep. 2 P. C. 365.

have expressed at a length greater than is usual, are of opinion that the decision of the learned judge of the Arches Court as to the vestments worn by the appellant, following that of this Committee in *Hebbert* v. *Purchas* (1), is correct, and ought to be affirmed.

Their Lordships will now proceed to consider the charge against the appellant with reference to his position during the prayer of consecration.

The allegation upon that head is that the appellant, when officiating in the service of the Holy Communion, unlawfully stood, while saying the prayer of consecration in the said service, at the middle of the west side of the communion table, such communion table then standing against the east wall, with its shorter sides towards the north and south, in such wise that during the whole time of his saying the said prayer he was between the people and the communion table with his back to the people, so that the people could not see him break the bread or take the cup in his hand.

The rule by which the position of the minister during the celebration of the Holy Communion is to be determined must be found in the rubrical directions of the Communion Office in the Prayer Book, there being, as to this matter, nothing in any statute to control or supplement those directions.

In examining these directions their Lordships propose to put aside the argument, very much pressed upon them, that the proper and only proper position for the communion table is in the body of the church, or in the middle of the chancel, and that it is in a wrong position when placed, at the time of the Communion Service, along the east wall. They think this argument has no sufficient foundation. No charge is made that in the church of the appellant the communion table stood where it ought not to have stood, and, in the opinion of their Lordships, no such charge could have been sustained.

The rubric, indeed, contemplates that the table may be removed at the time of the Holy Communion; but it does not, in terms, require it to be removed. Morning and evening prayer are, according to one of the early rubrics of the Prayer Books, to be

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used in the accustomed place of the church, chapel, or chancel. In churches where it is customary to use both the chancel and body of the church, or the chancel alone, for morning and evening prayer, the direction that the table shall stand "where morning and evening prayer are appointed to be said," is satisfied without moving it. That direction cannot be supposed to mean that the position of the table is to be determined by that of the minister's reading-desk or stall only, the service being "used" and "said" by the congregation as to the part in it assigned to them, as well as by the minister. The practice as to moving or not moving the table has varied at different times. It was generally, if not always, moved in the earlier part of the post-Reformation period. When the revision of 1662 took place, and when the present rubric before the prayer of consecration was for the first time introduced, it had come to be the case that the table was very seldom removed. The instances in which it has been removed may be supposed from that time to have become still more rare; and there are now few churches in the kingdom in which, without a structural re-arrangement, the table could be conveniently removed into the body of the church. The utmost that can be said is, that the rubrics are to be construed so as to meet either hypothesis.

Their Lordships have further to observe that the rubrics assume that, before the prayer of consecration is reached, those who intend to communicate will have drawn near to the communion table, wherever it may be placed, so as to concentrate the communicants near it or round it, and thus enable them to witness the ministration more easily than if they had remained in their places throughout the church.

It is proper also to point out that the term "east" or "eastward" nowhere occurs in the rubrics. From the mention that is made of the north side it seems to be supposed that in all churches that expression would represent a uniform position, and there is no doubt that, from the almost universal eastward position of churches in England, this would be the case; but the north is the only point of the compass which is actually referred to.

During several portions of the Communion Office the minister is directed, either expressly, or by reference or implication, to

stand at the north side of the table. Where this is the case, their Lordships have no hesitation in saying that whether the table is placed altar-wise along the east wall, or standing detached in the chancel or church, it is the duty of the minister to stand at the side of the table which, supposing the church to be built in the ordinary eastward position, would be next the north, whether that side be a longer or shorter side of the table. No doubt in a certain context the word "side" might be so used as to be shewn by that context to be contra-distinguished from the top, or bottom, or end of a subject of quadrilateral or any other figure. But for this purpose a determining context is necessary. In the absence of such a context it is accurate, both in scientific and in ordinary language, to say that a quadrilateral table has four sides. In the rubrics not only is there no context to exclude the application of that term to the shorter as well as the longer sides; but the effect of the context is (as it appears to their Lordships) just the reverse. The direction is absolute, and has reference to one of the points of the compass, which are fixed by nature; the figure and the position of the table are not fixed, either by nature or by law; and the purpose of the direction is to regulate, not one part or another of the table, but the position of the minister with reference thereto. Under these circumstances it seems extravagant to put on the word "side" a sense more limited than its strict and primary one for the purpose of suggesting difficulties in acting upon the rule, which for two centuries were never felt in practice, and which would not arise if the strict and primary sense were adhered to.

If it were necessary that there should be extracted from the rubrics a rule governing the position of the minister throughout the whole Communion Office, where no contrary direction is given or necessarily implied, the rule could not, in their Lordships' opinion, be any other than that laid down in *Hebbert* v. *Purchas* (1); and they entertain no doubt that the position which would be required by that rule—a position, namely, in which the minister would stand at the north side of the table, looking to the south—is not only lawful, but is that which would, under ordinary circumstances, enable the minister, with the greatest certainty and convenience, to fulfil the requirements of all the rubrics. The

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case, however, with which their Lordships have to deal is one which may assume the character of a penal charge. It might be a penal charge against the present appellant that he has stood, during the prayer of consecration, on the west side of the table; and, on the other hand, on a construction of the rubric the opposite of that contended for by the respondents, a penal charge might be maintained against a priest who stood at the north side. It is therefore necessary to be well assured, both that there is a direction free from ambiguity that the priest should stand, during this particular prayer, either at the north or at the west side, and also that no other test is supplied by the rubric in question which would be a sufficient and intelligible rule for the position, at that part of the service, of the priest.

Their Lordships have therefore to consider the precise wording of the rubric preceding the prayer of consecration, taken in connection with the prayer itself.

It is to be observed that the revision in 1662, introduced for the first time the breaking of the bread as one of the manual acts to be done during the prayer of consecration, and that, although some of the other manual acts, namely, the taking the bread and the cup into the priest's hands, had been mentioned in the rubric of the first Prayer Book of Edward VI., they had not been contained in the second Prayer Book of that sovereign, or in the Prayer Books of Elizabeth or James I. The rubric, "That he may with the more readiness and decency break the bread before the people," &c., was also new; and it is not impossible that one of the reasons for its introduction may have been to meet one of the demands or suggestions of the Puritan party, who had proposed a form of service in which the priest was to be ordered to break the bread "in the sight of the people" (4 Hall, Reliq. Liturg.)

Their Lordships are of opinion that the words "before the people," coupled with the direction as to the manual acts, are meant to be equivalent to "in the sight of the people." They have no doubt that the rubric requires the manual acts to be so done, that, in a reasonable and practical sense, the communicants, especially if they are conveniently placed for receiving of the Holy Sacrament, as is presupposed in the office, may be witnesses

of, that is, may see them. What is ordered to be done before the people, when it is the subject of the sense, not of hearing, but of sight, cannot be done before them unless those of them who are properly placed for that purpose can see it. It was contended that "before the people" meant nothing more than "in the church;" to guard against an anterior and secret consecration of the elements. But if the words "before the people" were absent, the manual acts, and the rest of the service, could not be performed elsewhere than in the church, and in that sense coram populo, nor could the Sacrament be distributed except in the place and at the time of its consecration; and this argument would, therefore, reduce to silence the words "before the people," which are an emphatic part of the declaration of the purpose for which the preparatory acts are to be done. That declaration applies not to the service as a whole, nor to the consecration of the elements as a whole, but the manual acts, separately and specifically.

There is, therefore, in the opinion of their Lordships, a rule sufficiently intelligible to be derived from the directions which are contained in the rubric as to the acts which are to be performed. The minister is to order the elements "standing before the table:" words which, whether the table stands "altarwise" along the east wall, or in the body of the church or chancel, would be fully satisfied by his standing on the north side and looking towards the south; but which also, in the opinion of their Lordships, as the tables are now usually, and in their opinion lawfully, placed, authorize him to do those acts standing on the west side and looking towards the east. Beyond this and after this there is no specific direction that, during this prayer, he is to stand on the west side, or that he is to stand on the north side. He must, in the opinion of their Lordships, stand so that he may, in good faith, enable the communicants present, or the bulk of them, being properly placed, to see, if they wish it, the breaking of the bread and the performance of the other manual acts mentioned. He must not interpose his body so as intentionally to defeat the object of the rubric and to prevent this result. It may be difficult in particular cases, to say exactly whether this rule has been complied with; but where there is good faith the

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difficulty ought not to be a serious one; and it is, in the opinion of their Lordships, clear that a protection was in this respect intended to be thrown around the body of the communicants, which ought to be secured to them by an observance of the plain intent of the rubric.

In applying these principles to the present case, their Lordships find that some difficulty has arisen from the circumstances under which the evidence was taken. The charge against the appellant was a twofold one; both that he had stood at the middle of the west side with his back to the people, and that the people could not see him break the bread or take the cup in his hand. The witness Nicholson undoubtedly states that, at the service of which he speaks, while sitting in the nave, he could not see the appellant perform the manual acts; and the witness Bevan gives evidence to the same effect. But with regard to Nicholson, he explains, as their Lordships understand his evidence, that, whether persons could see what the appellant was doing would depend on whether they were sitting immediately behind him, or were sitting on one side or the other; and with regard to Bevan, he states that, what would have prevented a man who sat at the side from seeing what the appellant did, was, that he had on a chasuble, "which is a sort of cloak which spreads his body out."

When the appellant himself was examined, he does not appear to have been asked any question on the subject; and the inference which their Lordships draw from the whole examination is, that inasmuch as at that time it was understood to be the law, founded on the decision in *Hebbert* v. *Purchas* (1), that the standing on the west side of the table was, of itself and without more, unlawful, neither party thought it important to carry the evidence with any precision beyond this point, the respondents thinking they had established their case, and the appellant not being prepared to dispute the fact of the position in which he stood.

Their Lordships are not prepared to hold that a penal charge is established against the appellant merely by the proof that he stood while saying the prayer of consecration at the west side of the Communion table, without further evidence that the people could not, in the sense in which their Lordships have used the words,

(1) Law Rep. 3 P. C. 605.

see him break the bread or take the cup into his hand, and they will therefore recommend that an alteration should be made in the decree in this respect.

Their Lordships, before leaving this part of the case, think it right to observe that they do not consider the judgment in the case of *Martin* v. *Mackonochie* (1) to have any material bearing on the question now before them. The decision in that case was that the priest must stand during the prayer of consecration, and not kneel during a part of it. The correctness of that decision has not been, and, as their Lordships think, cannot be, questioned. Nothing is more clear throughout the rubrics of the Communion Office than that when the priest is intended to kneel, an express provision is made on the subject. The conclusion, however, in *Martin* v. *Mackonochie* (1), is expressed perhaps more broadly than was necessary for the decision. What was obviously meant was that the posture of standing was to be continued throughout the whole of the prayer. Nothing was or could be decided as to the place in which the priest was to stand, for that question was not raised, and was not in any manner argued, in the case.

Their Lordships will now proceed to the charge as to wafer or wafer-bread. The charge as to this is, "that the appellant used in the Communion Service and administration wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers instead of bread, such as is usual to be eaten." And this is traversed by the appellant.

It appears that the allegation is in the same form as that used in the *Purchas Case* (2); but in that case the defendant did not appear, and no criticism seems to have taken place as to the form of the allegation or its sufficiency.

It is probable that the allegation was meant to raise the question as to the legality of the wafer, as distinguished from bread of the kind "usual to be eaten," and there are certainly some indications that the appellant and his counsel so understood, and meant to meet, the charge.

A different view has, however, been taken by the counsel for the appellant on the appeal, and they have maintained that there is no averment that the wafer, as distinguished from bread ordi-

(1) Law Rep. 2 P. C. 365. (2) Law Rep. 3 P. C. 605.

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narily eaten, was used. They contend that the charge goes to the shape, and not to the composition, of the substance.

Their Lordships are of opinion that this objection must prevail. The charge, in their opinion, is consistent with the possibility of it having been the fact that bread "such as is usual to be eaten," but circular, and having such a degree of thinness as might justify its being termed wafers, was what was used, and if this is what was used their Lordships do not think it could be pronounced illegal.

As, however, the question of the construction of the rubric has been raised on this appeal, as it was in the *Purchas Case*, their Lordships think it right to express their opinion upon it, at the same time that they give the appellant the benefit of the ambiguity which exists in the form of the charge.

It is to be observed that the rubric does not in any part of it use the term "wafer." The words are "bread:" "bread such as is usual to be eaten," and "the best and purest wheat bread that conveniently may be gotten."

Their Lordships have no doubt that a wafer, in the sense in which the word is usually employed, that is, as denoting a composition of flour and water rolled very thin and unleavened, is not "bread such as is usual to be eaten," or "the best and purest wheat bread that conveniently may be gotten."

The only question on the construction of the rubric is that raised upon the words "it shall suffice."

There is no doubt that in many cases these words standing alone, and unexplained by a context, would be quite consistent with something different from, larger or smaller, more or less numerous, more or less costly, than what is mentioned, being supplied.

Here, however, the sentence commences with the introduction: "To take away all occasion of dissension and superstition, which any person hath or might have concerning the bread, it shall suffice," &c. These words seem to their Lordships to make it necessary that that which is to take away the occasion of dissension and superstition should be something definite, exact, and different from what had caused the dissension and superstition. If not, the occasion of dissension remains, and the superstition

may recur. "To suffice," it must be as here described. What is substantially different will not "suffice."

The rubric, which orders that the bread and wine shall be provided by the curate and churchwardens at the charges of the parish, seems to contemplate ordinary bread as the only material to be used, and the 20th Canon is still more precise in the same direction.

The former rubric (of 1552, 1559, and 1604) had said, "It shall suffice that the bread be such as is usually to be eaten at the table with other meats, but the best and purest wheat bread that conveniently may be gotten." Queen Elizabeth's Injunction of 1559 on the same subject (in its form mandatory, and acted upon for many years afterwards) was issued when this rubric had the force of law, and must be understood in a sense consistent with, and not contradictory to, it. That injunction distinguishes between (Card. Doc. Ann. vol. i. p. 202) "the sacramental bread" and "the usual bread and water, heretofore named singing cakes, which served for the use of the private mass;" directing the former to be "made and formed plain, without any figure thereupon, and of the same fineness and fashion round" as the latter, but "to be somewhat bigger in compass and thickness." The form, and not the substance, is here regulated. To order the use of the substance properly called "wafer," which was not "bread such as is usual to be eaten at the table" would have been directly contradictory to the rubric; and this cannot be supposed to have been intended.

There was evidently "dissension" on this subject, and some diversity of practice, in the reign of Elizabeth. It appears from passages in the Fourth Book of the Ecclesiastical Polity (Hooker's Works by Keble, vol. i. 6th ed. pp. 449-451), published in 1594, that Hooker considered the use, either of leavened or of unleavened bread, to be at the time lawful. But the point was one as to which controversy then existed, and had given occasion to strife. In 1580, Chaderton, Bishop of Chester, acting as commissioner in Lancashire, under the Crown, applied to the Privy Council for instructions as to "two special points worthy of reformation;" one of which was "for the Lord's Supper, with wafers, or with common bread?" The Lords of the Council replied (26th July,

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1580) that they thought both points ought to be referred to the consideration of Parliament; adding:

In the meantime, for the appeasing of such division and bitterness as doth and may arise of the use of both these kinds of bread, we think it meet, that in such parishes as do use the common bread, and in others that embrace the wafer, they be severally continued as they are at this present. Until which time, also your Lordship is to be careful, according to your good discretion, to persuade and procure a quietness amongst such as shall strive for the public maintaining either of the one or the other.—Peck's Desiderata Curiosa, p. 91.

In a later letter, the Bishop recurred to the same question, and was thus answered (21st August, 1580), by Lord Burghley and Sir Francis Walsingham:

Concerning the last point of your letter, contained in a postscript, whereby appeareth that some are troubled about the substance of the Communion bread, it were good to teach them that are weak in conscience, in esteeming of the wafer bread, not to make difference. But, if their weakness continue, it were not amiss, in our opinions, charitably to tolerate them, as children with milk. Which we refer to your Lordship's better consideration.—Peck's Desiderata Curiosa, p. 94.

In 1584, Bishop Overton, of Lichfield, issued an injunction to the clergy of his diocese:

That the Ordinance of the Book of Common Prayer be from henceforth observed in this, that the bread delivered to the communicants be such as is usual to be eaten at the table with other meats, yet of the purest and finest wheat; and no other bread to be used by the minister, nor to be provided for by the churchwardens and parishioners, than such finest common bread.—Appendix to Second Rep. of Rit. Com. p. 430.

The 20th Canon of 1603-4, already mentioned, seems to have proceeded on the same view of the law; and, after the passing of that Canon, the usual form of inquiry in the visitation articles of bishops and archdeacons (e.g., Archbishop Bancroft in 1605, Bishop Babington, of Worcester, in 1607, and Bishop Andrewes in 1619), was, whether the churchwardens always supplied, for the Holy Communion, "fine white bread."

The same form of inquiry continued to be generally used after the rubric had been altered, upon the revision of 1662, so as to express its purpose to be "to take away all occasion of dissension," as well as of "superstition" (which alone had been previously mentioned). The same motive had been expressed in the rubric of King Edward's First Prayer Book, "for avoiding all matters

and occasion of dissension" ("superstition" not being then added); when the opposite course was taken, of requiring unleavened bread, of a certain form and fashion, to be everywhere and always used. The practice of using fine wheat bread such as is usual to be eaten, and not cake or wafer, appears to have been universal throughout the Church of England from the alteration of the rubric in 1662, till 1840, or later.

Their Lordships think that if it had been averred and proved that the wafer, properly so called, had been used by the appellant, it would have been illegal, but as the averment and proof is insufficient, they will advise an alteration of the decree in this respect.

There remains to be considered the charge as to the crucifix. As to this the allegation is, that the appellant unlawfully set up and placed upon the top of the screen separating the chancel from the body or nave of the church a crucifix and twenty-four metal candlesticks, with candles which were lighted on either side of the crucifix.

This charge was accompanied by two other charges, in respect of which the appellant has been admonished to abstain from the acts complained of, and to this part of the monition he has submitted. One of these charges was for having formed and accompanied a procession from the chancel, down the north aisle and up the nave back to the chancel again, on the occasion of public service, those taking part in the procession at one time falling upon their knees, and remaining kneeling for some time. The other charge was the setting up, attached to the walls of the church, representations of figures, in coloured relief, of plastic material, purporting to represent scenes of our Lord's Passion, and forming what are commonly called Stations of the Cross and Passion, such as are often used in Roman Catholic churches.

The learned judge whose decision is under appeal thus describes the screen and crucifix:

> There is a screen of open ironwork some nine feet high stretching across the church at the entrance to the chancel; the middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the Cross in full relief and about eighteen inches long—this is the crucifix complained of. The screen of course, from its position, directly faces the congregation, and the sculptured or moulded figure of our Lord is turned towards them. There is,

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further, a row of candles at distances of nearly a foot apart all along the top of the screen, which is continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles are lighted for the evening service, I should presume that the crucifix would stand in a full light.

For the erection of this screen at the entrance of the chancel, in the form in which it is now found there, and surmounted by the crucifix in question, their Lordships think it clear that no faculty has been obtained. There is indeed a faculty, dated the 23rd of August, 1870, authorizing the building of "a dwarf wall with screen thereon of light ironwork between the chancel and the nave;" and this faculty appears to have been granted with reference to a ground plan annexed to the petition for the faculty: which ground plan specifies the place where this screen of light ironwork was to be erected. But no further information was given to the ordinary of the character of the structure, much less of the crucifix by which it was to be surmounted.

Technically, therefore, it must be held that in the absence of a proper faculty the crucifix was unlawfully set up and retained. If, however, their Lordships were of opinion that the case was one in which, under all the circumstances, the ordinary, on the application for a faculty, ought to grant, or might properly grant, a faculty, they might probably have thought it right, before pronouncing any judgment, to have given an opportunity to the appellant to apply for a faculty.

Their Lordships, however, are of opinion that, under the circumstances of this case, the ordinary ought not to grant a faculty for the crucifix.

The learned judge refers to two cases decided by this tribunal which have a material bearing upon the present question.

The first of these was the case of *Liddell* v. *Westerton*. (1) In this case, as the learned judge states, the Court had to pronounce upon the legality of a cross set up in the appellant's church. And it was decided that, although before the Reformation the symbol of the cross had no doubt been put to superstitious uses, "yet that crosses, when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations," and that the

(1) Moore's Special Report.

wooden cross erected in that particular case "was to be considered a mere architectural ornament."

The Court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the judgment to point out that crosses were to be distinguished from crucifixes, saying that "there was a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix," the former of which, they said, had been "used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced."

The other case is that of *Phillpotts* v. *Boyd.* (1) As to this case, the learned judge states that this tribunal, in justifying the erection of the Exeter reredos, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the *purpose of decoration only*," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been, or is likely to be, paid to any of the figures upon it."

The learned judge then proceeds to consider whether it would be right to conclude that the crucifix in the present case was set up for the purposes of decoration only; whether it is in danger of being abused, and whether it could be suggested that superstitious reverence had been, or was likely to be, paid to it.

The learned judge states that the crucifix, as formerly set up in our churches, had a special history of its own.

He refers to the rood ordinarily found before the Reformation in the parish churches of this country, which was, in fact, a crucifix with images at the base, erected on a structure called the rood loft, traversing the church at the entrance to the chancel, and occupying a position not otherwise than analogous to that which the iron screen does in the present case.

He refers to the evidence as to the preservation of the crucifixes or roods during the reign of Queen Mary, and of their destruction, as monuments of idolatry and superstition, in the reign of Elizabeth.

(1) Law Rep. 6 P. C. 435.

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He takes notice of a letter of Bishop Sandys in 1561 in the Zurich Letters, first series, p. 73, in which he states:

We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the Church, that the image of Christ crucified, together with Mary and John, should be placed, as heretofore, in some conspicuous part of the church, where they might more readily be seen by the people. Some of us thought far otherwise, and more especially as all images of every kind were at our last visitation not only taken down but also burnt, and that too by public authority, and because the *ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others.*

The learned judge arrives at the conclusion that the crucifix so placed formed an ordinary feature in the parish churches before the Reformation, and that it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration.

He further points out that the worship of it was enjoined in the Sarum Missal, in which the order of service for Palm Sunday ends with the adoration of the rood by the celebrant and choir before passing into the chancel. And to this reference might be added one to the order for the Communion according to the Hereford use, in which there is a prayer with this introduction:

Postea sacerdos adorans crucifixum dicat.

Proceeding then on these considerations, and dealing with a church in which was found not merely an illuminated crucifix, but also those stations of the cross and other acts in the conduct of the services, the illegality of which the appellant does not challenge in his appeal, the judge continues thus:

It is no doubt easy to say, what proof is there of danger of idolatry now? What facts are there to point to a probability of "abuse?"

But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the Church and for the particular purpose of "adoration"—when the Court finds that the same object, both in the Church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church *as an architectural ornament only*, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in "decoration" may end in "idolatry."

If this apprehension is a just and reasonable one, then there exists that likeli-

hood and danger of "superstitious reverence" which the Privy Council in *Phillpotts* v. *Boyd* (1) pronounced to be fatal to the lawfulness of all images and figures set up in a church.

In these observations of the learned judge their Lordships concur; and they select them as the grounds of his decision which commend themselves to their judgment. They are prepared, under the circumstances of this case, to affirm the decision directing the removal of the crucifix, while at the same time they desire to say that they think it important to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Phillpotts* v. *Boyd* (1), subject to the power and duty of the ordinary so to exercise his judicial discretion in granting or refusing faculties, as to guard against things likely to be abused for purposes of superstition.

On the whole, therefore, their Lordships will humbly recommend Her Majesty to affirm the decree of the Court of Arches except as regards the position of the minister and the use of wafer-bread or wafers; and as to these excepted matters they will humbly advise Her Majesty that inasmuch as it is not established to their satisfaction that the appellant, while saying the prayer of consecration, so stood that the people could not see him break the bread or take the cup into his hand, as alleged in the representation; and, inasmuch as it is not alleged or proved that what was used by him in the administration of the Holy Communion was other than bread such as is usual to be eaten, the decree of the Court of Arches should be in these respects reversed. And they will further humbly advise Her Majesty that in respect of the charges as to which the decree is reversed, the costs in the Court of Arches should be paid by the respondents to the appellant; and further, that there should be no costs of this appeal.

Proctor for appellant: *G. H. Brooks.*

Proctors for respondents: *Moore & Currey.*

(1) Law Rep. 6 P. C. 435.

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July 17.

[IN THE COURT OF ARCHES.]

THE OFFICE OF THE JUDGE PROMOTED BY COMBE *v.* EDWARDS.

Evidence—Advertisements of Queen Elizabeth—Form of Decree.

The incumbent of a parish church was charged with wearing, when officiating in the Communion Service, certain vestments called respectively a chasuble, alb, amice, maniple, and stole. At the hearing of the suit the charge was proved; but it was submitted on behalf of the defendant that as the promoter had not proved the "Advertisements of Queen Elizabeth," he had failed to establish that the vestments were illegal:—

Held, that the Court was bound to follow the ruling of the Judicial Committee of the Privy Council in *Ridsdale* v. *Clifton* (1), and that it was unnecessary for the promoter to prove the Advertisements.

THIS case came before the Court by virtue of letters of request under the Church Discipline Act (3 & 4 Vict. c. 86), signed by the Bishop of Gloucester and Bristol, on the 21st of January 1874, after a commission under the provisions of that Act had reported that there were primâ facie grounds for instituting further proceedings against the defendant, the Rev. John Edwards the younger, vicar of Prestbury, in the diocese of Gloucester and Bristol. (2)

The suit was promoted by Charles Combe, a parishioner of Prestbury, and the letters of request having been accepted by the Dean of Arches, the Right Hon. Sir Robert Phillimore; and a decree of letters of request decreed to issue, an appearance was on the 27th of March, 1874, after personal service of such decree, entered on behalf of the defendant; and the proctors for the promoters subsequently brought in articles, which, on the 27th of November, 1874, were, after amendment, admitted to proof. (3)

Of the articles so admitted to proof, the 11th, 12th, and 13th are alone material to this report. The 11th Article charged that the defendant, during the performance of divine service and the administration of the Holy Communion, and when officiating in the parish church of Prestbury, placed or kept, or sanctioned or permitted, the placing and keeping, upon a shelf or ledge imme-

(1) Ante p. 276.

(2) For proceedings in connection with the issue of this commission, see *Ex parte Edwards*, Law Rep. 9 Ch. 138.

(3) See *Combe* v. *Edwards*, Law Rep. 4 A. & E. 390.

See further this case Combe v. Edwards
6 P.D. 157

diately over the Holy Table, a metal crucifix, with a figure of our Saviour thereon, having candles standing by the side thereof, which were lighted at certain parts of the service, the said crucifix not being a part of the architectural decorations of the church. The same article further charged the ceremonial bowing to or toward the said crucifix before and during the performance of divine service.

The 12th Article charged the wearing by the defendant, when officiating in the Communion Service and in the administration of the Holy Communion in the said church, of divers ceremonial dresses, vestments, and things of divers forms and colours, and with divers decorations thereon, other than and besides or instead of the habits appointed and allowed by law.

The 13th Article charged the wearing by the defendant, when officiating in the Communion Service and in the administration of the Holy Communion in the said church, as a matter of ceremony of certain vestments or things called respectively a chasuble, alb, amice, maniple and stole.

On the 15th of December, 1874, the proctor for the defendant gave a negative issue to the articles; and on the next day filed a responsive plea, the substance of which, so far as material (1), is stated in the judgment. The defendant, having subsequently required the personal answers of the promoter to the responsive plea, such personal answers were taken under a commission, when it appeared that, except as to portions of the responsive plea, immaterial to this report, the promoter admitted the allegations therein contained to be true.

On the 11th of May, 1876, the cause came on for hearing at Lambeth Palace, before the Dean of Arches, the Right Hon. Lord Penzance, and witnesses for the promoter having been examined orally in court in support of the articles, but no evidence produced on behalf of the defendant, the Court, with the consent of the counsel for the promoter and defendant, directed the cause to be adjourned.

June 18, 1877. *Dr. Deane, Q.C.*, and *Blakesley*, for the promoter.

(1) See *Combe* v. *Edwards*, Law Rep. 4 A. & E. 390.

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A. J. Stephens, Q.C., W. G. F. Phillimore, and *Jeune,* for the defendant. As to the charges against the defendant in the 12th and 13th Articles: The Judicial Committee of the Privy Council came to the conclusion, in *Ridsdale* v. *Clifton* (1), that Mr. Ridsdale had offended against the laws ecclesiastical by wearing vestments and dresses similar to those the defendant in the present suit is alleged to have worn, but their Lordships only arrived at such a conclusion on a construction of the Advertisements of Queen Elizabeth, which were for the purpose of that case, and that case only, admitted by consent. No other evidence of their existence or authenticity of such Advertisements was before the Court in *Ridsdale* v. *Clifton* (1) than what purports to be a copy of them as printed in Dr. Cardwell's Documentary Annals. The defendant, however, in the present case is not prepared to make the same admissions as were made in *Ridsdale* v. *Clifton* (1), and it must therefore follow that, unless the promoter produces proper proof of the authenticity and contents of the Advertisements, the decision in *Ridsdale* v. *Clifton* (1) is not binding on the defendant, and the promoter must be held to have failed in proving the articles containing the charges now in question.

Dr. Deane, Q.C., in reply. Having regard to the decision in *Ridsdale* v. *Clifton* (1), it is clearly not necessary for the promoter to produce evidence either as to the authenticity or the contents of the Advertisements.

Cur. adv. vult.

July 17, LORD PENZANCE. This suit was commenced in the year 1874. It is a proceeding under the Church DisciplineAct, and the defendant is charged with having offended against the laws ecclesiastical by several illegal ceremonial acts and observances during the celebration of divine service in the parish church of Prestbury, of which he admits that he has been rector upwards of fourteen years.

The acts complained of are charged as taking place between the 2nd of February and the 8th of June, 1873.

The defendant, in his responsive plea, has not denied any of the acts, matters, or things, charged against him, but alleges that

(1) Ante, p. 276.

he has been diligent in conducting his ministrations, and has, for upwards of seven years, had a daily celebration of the Holy Communion in his church, which he has much restored and beautified.

At the hearing of the cause, the defendant's counsel admitted that the 4th, 6th, 8th, 9th, and 10th Articles were proved, and that he did not contest the illegality of the matters therein alleged and charged against the defendant.

On the other hand, the promoter admitted that since the decision of the case of *Ridsdale* v. *Clifton* (1), he could not, upon the evidence he had given, sustain the charges contained in the 5th and 7th Articles.

These respective admissions reduced the articles upon which there was any controversy to the 11th, which related to a crucifix upon the communion table, and the 12th and 13th, which related to vestments.

With regard to the crucifix, the charge, as contained in the 11th Article, is as follows:—[His Lordship here read the 11th Article, and, after discussing the evidence produced on behalf of the promoter in support of the charge therein contained, proceeded as follows]:—

It is objected that on the evidence the charge is not made out. First, it is said, and truly said, that there is no proof whatever that the defendant had any hand in placing the crucifix where it stood, nor, indeed, any proof how it came there, nor how long it had been there, nor that it had been placed there within two years before the suit; and as to the charge of permitting it to remain there, it was contended that the defendant had no right when the crucifix was once placed there (perhaps by the churchwardens) to remove it without a faculty, and that it was open to any one else interested, as well as the defendant, to apply for such faculty, and that the not applying for such faculty is not an ecclesiastical offence.

I think these objections must prevail. The proper mode of questioning the propriety of the crucifix is, I think, by application for a faculty to remove it. The precise position which it occupies, and the degree in which it is identified with the communion table,

(1) Ante, p. 276.

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may then be more exactly proved, with a view to determining whether it falls within the case of *Durst* v. *Masters* (1), and is or is not contrary to ecclesiastical law. The evidence as to bowing and doing reverence to the crucifix is, I think, too uncertain to justify me in holding that part of the charge proved.

With regard to the vestments, the argument was confined to a single point.

It was admitted that the Court of Appeal, in *Ridsdale* v. *Clifton* (2), had declared the vestments to be illegal, but it was contended that the conclusion thus arrived at was in a large degree based upon the view taken by the Court of the Advertisements of Queen Elizabeth.

The Advertisements the Court held to be "a taking of order" within the Act of Parliament 1 Eliz. c. 2, s. 25, by the Queen, with the advice of the Metropolitan, and then proceeded to comment upon the directions as to the vestments contained in them, reading these directions from the copy of the Advertisements to be found in the first volume of Dr. Cardwell's Documentary Annals.

Now, what the defendant's counsel in the present case contends is this, that no proof has been given in this case of the existence of these Advertisements, or of their contents, that even if Dr. Cardwell's book had been produced and relied upon, which it was not, the defendant would not be prepared to admit the authenticity of the copy of the Advertisements which it contains, and that in default of proper proof of the contents of the Advertisements, the foundation of the late judgment would be wanting, and the judgment itself must cease to be an authority.

In dealing with these objections, it cannot, I think, be denied that the Advertisements referred to did play a prominent part in the considerations upon which the Court of Appeal appear to have proceeded; but I will go further, and assume, for the purpose of argument, that the Advertisements supplied an indispensable part of the reasoning upon which the judgment was founded, so that, if the existence of these Advertisements and their contents had not been established, the decision of the Court would have been the other way, and the vestments, upon the true construction of

(1) 1 P. D. 373. (2) Ante, p. 276.

the Ornaments Rubric, declared to be authorized by ecclesiastical law.

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Upon this assumption the contention of the present defendant amounts to this, that on every occasion upon which the meaning and construction of the Ornaments Rubric and the statute by which it is authorized has to be declared and acted upon, the issuing of the Advertisements, their contents, and all the historical records and events which the Court of Appeal passed in review in connection with them, and accepted as entering into their consideration in the conclusions of law at which they arrived, must be proved afresh in this court before the decision of the Court of Appeal can be treated as binding upon it.

The first obvious consequence of this proposition would be that if in any case—say, in this present case—no proofs whatever were given of these Advertisements and the facts and events above mentioned, not only this Court but the Court of Appeal, dealing only with the case as it was presented upon evidence in the Court below, would be obliged to declare that the true construction of the rubric was exactly the reverse of what it had solemnly declared that construction to be in the case of *Ridsdale* v. *Clifton* (1).

Upon similar reasoning it would seem to follow that if, under historical research, fresh documents or records should present themselves, throwing further and perhaps a contradictory light on the authority by which these Advertisements were issued, or fresh arguments should arise founded upon any new or additional historical facts which might be disinterred from the lumber of the past, the whole question must be at once re-opened, and the existing decision as to the meaning of the rubric be no longer of binding authority.

In such a state of things who could at any given time say what the law was? In truth there could be no law. For its direction and declaration would be liable to vary from time to time, according to the ingenuity and industry of those who supplied the materials by way of evidence out of which the Courts in each individual case would have to construct their decisions, and what was declared legal to-day would have to be declared illegal and punishable to-morrow.

(1) 1 P. D. 316; ante, p. 276.

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A contention leading to such results appears to me to be untenable, and I have no hesitation in pronouncing that it proceeds from an entirely erroneous view of the subject. Courts of law must of necessity vary their decisions in the application of law to fact according to the evidence in each individual case; but the law itself, or the construction of an Act of Parliament, once arrived at and declared by an ultimate Court of Appeal, remains the law until it is varied or reversed by the legislature. The circumstance that the due construction of an Act of Parliament has only been arrived at after an historical investigation involving many facts, events, and documents appears to me to make no difference, and it is no more necessary to repeat that investigation every time that the law is applied than it is to repeat the arguments by which the law came finally to be decided.

The contention of the defendant therefore fails, and in accordance with the judgment of Her Majesty in Council in the case of *Ridsdale* v. *Clifton* (1), by which this Court is bound, I must pronounce the 12th and 13th Articles proved.

The promoter of the suit does not ask that a monition should issue, but, on the contrary, he desires that the Court should follow the precedent in the case of *Heath* v. *Burder*. (2)

I see no objection to this course being followed. And, considering the great time which has elapsed since the occurrence of the matters complained of, I think it meets the necessities of the case.

The registrar will draw up the decree accordingly, without costs on either side.

The minute of the decree, entered in the registry, was as follows:—

The judge having heretofore heard counsel on both sides, and counsel for the promoter having at the hearing of the cause abandoned and withdrawn the charges alleged in the 5th and 7th Articles . . . . in this cause; and the counsel for the defendant having at such time stated that he had no argument to offer against Articles 4, 6, 8, 9, and 10, ... and the said judge having maturely deliberated, by his interlocutory decree did pronounce and declare that Moore had sufficiently proved the contents of the 4th, 6th, 8th, 9th, 10th, 12th, and 13th Articles in this cause, but had failed in proof of the 11th Article, . . . and that

(1) 1 P. D. 316; ante, p. 276. (2) 15 Moo. P. C. C. 1.

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the Rev. John Edwards the younger, the party proceeded against, had offended against the statute law and the constitutions and canons of the Church of England, as by law established, in the particular matters set forth in such of the said articles as he the said judge did pronounce to have been proved as aforesaid; and the said judge did assign Brooks to file in the registry of this court within a month a declaration under the hand of his said party, the said John Edwards the younger, stating whether he, the said John Edwards the younger, will abstain and refrain for the future from the usages, practices, acts, matters, and things set forth in the said articles proved as aforesaid, with intimation that should he repeat the same and not abstain and refrain therefrom, the Court will proceed as by law directed. The said judge did also direct each party to pay his own costs.

Proctors for promoter: *Moore & Curry.*
Proctor for defendant: *Brooks.*

[IN THE COURT OF ARCHES.]

June 18.

HUGHES AND ANOTHER *v.* EDWARDS.

Reredos—Architectural Adornment—Representation of the Crucifixion.

5 PD 13

A reredos, of which the central compartment consisted of a sculptured panel representing the crucifixion, having the figure of our Saviour on the cross and the figures of St. John and the three Marys on either side, all such figures being in high relief, was erected in a newly-built parish church. The bishop of the diocese refused to consecrate the church unless the central compartment of the reredos was removed, and it was accordingly removed, and the church was consecrated. Subsequently the churchwardens of the parish petitioned the ordinary for the grant of a faculty authorizing the replacement of such central compartment in the church, and the ordinary sent the case by letters of request to this court. The letters of request having been accepted, an appearance was entered for a parishioner, who opposed the grant of the faculty, on the ground that the central compartment of the reredos proposed to be replaced would, if so replaced, be either illegal or likely to receive superstitious reverence and be abused, or be inexpedient and likely to cause scandal and offence.

The Court ordered a faculty to issue for the restoration of the central compartment of the reredos.

THIS cause came before the Court by virtue of letters of request under the hand and seal of the chancellor of the diocese of St. Asaph [the Rev. Richard Bonner Maurice Bonner].

From the recitals in the letters of request, it appeared that the petitioners, the churchwardens of the parish of Denbigh, in the diocese of St. Asaph, had, previously to the issue of the letters of

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request, presented to the Consistory Court of St. Asaph a petition, of which the material portions were as follows:—

The petitioners are desirous of replacing the central compartment of the reredos erected in St. Mary's Church, Denbigh, which was removed at the request of the bishop of the diocese before the consecration of the church by him.

The petitioners, together with a large number of members of the congregation of St. Mary's Church, greatly deplore such removal and the consequent disfigurement of the reredos, and are desirous of obtaining the judgment of a competent legal tribunal whether such central compartment is legal or not.

Such central compartment consists of a sculptured panel representing the crucifixion scene, having the figure of our Saviour on the cross and the figures of St. John and the three Marys on either side. The length of such central compartment is 2 ft. 10 in. The figure of our Saviour on the cross is 2 ft. 8 in. high. The height of the standing figure is 2 ft. 5 in. The whole is of Caen stone, all the figures being in relief; the figure of our Saviour being in the same relief as the others. The central compartment forms an integral part of the reredos, which is incomplete without it, and the reredos in its complete state will be, as it is intended to be, an architectural adornment of the church.

The petitioners also propose for the additional embellishment of the church to place on either side of the reredos, extending the whole length of the east wall, a dado, or background, of Caen stone, divided into panels with Gothic tracery and canopies uniform with the reredos.

The petitioners pray that the vicar-general of the diocese of St. Asaph will be pleased to direct a faculty to issue authorizing the replacement and restoration of the central compartment of the reredos, and the fixing of the such dado, or background, as aforesaid. (1)

On the 13th of March, 1876, the Dean of Arches, the Rt. Hon. Lord Penzance, on an ex parte motion by counsel, accepted the letters of request, and decreed a decree by letters of request to issue. The decree by letters of request having thereupon issued out of the registry of this court, and service thereof having been duly effected, an appearance was entered for Mr. Edwards, a resident parishioner of the parish of Denbigh. (2) An act on

(1) It further appeared from the letters of request that on the 5th of February, 1876, a citation with intimation reciting the purport of the above petition, had issued out of the Consistory Court of St. Asaph, and that subsequently a caveat against the issue of the faculty had been entered in the diocesan registry of St. Asaph on behalf of J. C. W. Edwards, of Denbigh, the respondent in this Court, but that no further proceedings had been taken in the Court below.

(2) The decree by letters of request cited the above-named respondent, and the rector, and the parishioners and inhabitants of the parish of Denbigh, in special, and all others in general, &c., and contained an intimation that in default of any appearance being entered the Court would decree the faculty to issue.

petition was brought in on his behalf, of which the 3rd and 4th paragraphs were substantially as follows:—

3. The church of St. Mary, Denbigh was complete and ready to be consecrated, when, a few days before the day appointed for the consecration, the rector of Denbigh, and the committee for the building of the said church, erected in the said church the reredos in the petition mentioned, including the central compartment, without the knowledge of the bishop, and without the parishioners having any adequate opportunity of expressing their opinion upon it.

4. The reredos so erected, and in the petition mentioned, is at the back of, and immediately above, and of or about the same length as, the communion table; the said central compartment was subsequently removed by the direction of the bishop; the present application is for a faculty to authorize its being replaced: it contains no other figures or accessories therein than those mentioned in the petition. The figure of our Saviour is in high relief.

After alleging that the bishop, on his attention being called to the central compartment, had refused to consecrate the church so long as the central compartment remained there, and that in consequence of such refusal the said compartment had been removed, the act of petition proceeded in the 8th paragraph as follows:—

8. No faculty ought to issue for the restoration of the said central compartment of the said reredos, because the same is illegal and contrary to the law, statutes, canons, and formularies of the Church of England:

Because such an object in such a situation would not be a mere architectural ornament or adornment of the church, but, on the contrary, would be likely to receive superstitious regard and reverence, and would be in danger of being abused:

Because it is an adjunct to a Roman Catholic altar, but not to a communion table:

Because the same is inexpedient, and likely to cause scandal and offence.

The respondent by his answer denied the several allegations contained in the 8th Article of the act on petition, and alleged inter alia that sculptures in the central compartment would form an additional ornament or adornment, such as is frequent in churches of the Church of England, and was therefore not inexpedient or likely to cause scandal or offence.

June 2, 1877. The cause came on to be heard at Lambeth Palace, before the Dean of Arches.

On behalf of the petitioners witnesses were produced whose evidence proved that sculptured panels immediately above the communion table containing representations of the crucifixion,

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and alike in character to that proposed to be restored in St. Mary's Church, Denbigh, were still remaining in the parish churches of Croydon, in the diocese of Canterbury, and Towyn and Llandulas, in the diocese of St. Asaph, having been placed there before the consecration of those churches, and that similar structures had been erected in the churches of St. Margaret's Wells Street, and West Hackney, in the diocese of London, under the authority of unopposed faculties. An architectural plan shewing the position which the reredos, with the proposed addition of the central compartment, would occupy in the chancel of St. Mary's, Denbigh, and with photographs representing the reredos with such proposed addition, and the reredos as now in the church without the central compartment, were put in, and evidence explanatory of such drawing, and photographs were given by an architect.

No witnesses were called on behalf of the respondent.

Sir James Stephen, Q.C., and *Phillimore*, for the petitioners. The only substantial question to be decided by the Court is this, whether having regard to the law as recently settled by the Court of Appeal in *Boyd* v. *Phillpotts* (1) and *Ridsdale* v. *Clifton* (2) the central compartment proposed to be replaced would be, if so replaced, in danger of being abused or of having superstitious reverence paid to it. The principles laid down by the Judicial Committee of the Privy Council in *Boyd* v. *Phillpotts* (3) sanction the proposed faculty. A sculptured reredos, representing the crucifixion, is no more likely to be abused or to have superstitious reverence paid to it than a sculptured reredos representing the ascension or transfiguration. The recent decision of the same Court in *Ridsdale* v. *Clifton* (2) as to the illegality of a crucifix when placed on a chancel screen, can have no application where, as here, the legality of a sculptured representation placed in a church as an architectural decoration or adornment is in question. The crucifix and the rood have histories, the reredos has no history. In *Ridsdale* v. *Clifton* (2) it was held that there was evidence that the crucifix there objected to was, in the circum-

(1) Law Rep. 4 A. & E. 297; Law Rep. 6 P. C. 435.

(2) 1 P. D. 316; ante, p. 276.

(3) Law Rep. 6 P. C. 435.

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stances of the case, in danger of being abused, but there is no such evidence in this case. No proper distinction can be drawn between a reredos consisting of a sculptured representation of the crucifixion, and a painted window in which the same scene is presented. Yet it has been held in the case of St. Margaret's Church, Westminster, that such a painted window over the communion table could not be taken down as illegal: *Pierson* v. *Gell.* (1)

A. J. Stephens, Q.C., and *Bayford*, for the respondent. The central compartment, for the restoration of which the faculty is prayed, would, if erected in the position the petitioners propose, be in danger of being abused. It would be immediately above the communion table, and directly in front of the communicants, and might be liable to superstitious reverence during the Communion Service: see "The order of the Communion according to the use of Hereford" (2). It is a requirement of the Roman Church that, at the celebration of the Mass, there should either be a moveable crucifix on the altar or a representation of the figure of our Lord on the cross in some other position which would be visible to the priest and people, and this requirement would be complied with if the central compartment was replaced in the church: see Fornici, Institutiones Liturgicæ ad usum Seminarii Romani, Part I., ch. 3, p. 18; French translation, ed. 1851, p. 36; *Westerton* v. *Liddell* (3); Dolby's Church Vestments; Homily against Peril of Idolatry, pp. 194–95; Fulke's Answer to Martiall, pp. 204–205; Peacock's Church Furniture, pp. 44, 53, 62, 153, 206; Parker's Glossary of Architecture, p. 269. It is not necessary for the respondent to prove that the reredos in this case will be abused. It is sufficient for him to shew, from the previous superstitious use of similar representations, that such a structure would be liable to be an object of devotion, and at the time of service an instrument of devotion: *Ridsdale* v. *Clifton.* (2) If, as is now settled law, a moveable cross placed on a retable immediately above the communion table is forbidden in churches of the Church of England

(1) Return of Appeals before the High Court of Delegates, p. 85, No. 171, (Parliamentary Papers, 199, April 3, 1868.)

(2) *Ridsdale* v. *Clifton*, ante, p. 353; 1 P. D. 316; ante, p. 276.

(3) Moore's Special Report, at p. 178.

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Durst v. *Masters* (1), it is difficult to see how a crucifix placed in near connection with the communion table, as the crucifix in the central compartment of this reredos would be, can be held lawful. Even painted windows, it is submitted, would, if in danger of being abused, be unlawful. No evidence has been given of a faculty having been granted for the erection of any reredos containing a representation of the crucifixion where opposition has been offered. The decision of the Court of Appeal, in the case of *Boyd* v. *Phillpotts* (2), that a totally different representation, that of the ascension, was not unlawful on a reredos in a cathedral church, is no authority in favour of the petitioners.

Cur. adv. vult.

June 18. LORD PENZANCE. This suit comes before the Court on letters of request from the official principal of the Bishop of St. Asaph. It is an application for a faculty authorizing the restoration in St. Mary's Church, Denbigh, of a piece of sculpture which originally formed part of a reredos erected in that church a few years ago. Objection having been taken to the sculpture in question, it was very properly removed before the church was consecrated, and the churchwardens, by whose desire it was originally introduced, have now resorted to the proper and legal means of testing the objections made to it. The sculpture in question formed the central compartment of a reredos which was placed at the back of, and immediately above, the communion table. It is thus described in the petition of the promoters. [His Lordship here read the description of the centre compartment of the reredos as above set out.] The respondent in his act on petition speaks of the reredos in question thus. [His Lordship here read the 4th paragraph of the act on petition.] These descriptions, with the photograph appended to the original petition, are sufficient to enable the Court to understand the character and nature of the decoration for which the faculty is asked. The objection to it is shortly stated by the respondent in his act on petition in the 8th paragraph as follows:—[His Lordship here read the 8th paragraph of the act on petition.] On the other hand, it has been contended by the petitioners that the subject in question is an architectural

(1) Law Rep. 1 P. D. 373. (2) 6 Law Rep. P. C. 435.

decoration and nothing more. Between these two views there is, I think, in this particular case, no middle course open as a matter of law. It is no doubt, I think, competent to this Court, as it would have been to the Ordinary, if he had dealt with this case, to hold, in dealing with a faculty, that although the object in question was not absolutely illegal, the permission to introduce it into a church ought to be refused. But in this case there are no facts whatever brought before the Court upon which to exercise its discretion, as distinct from the question of legality. The churchwardens desire the faculty, and those who oppose it, although they say it is inexpedient and likely to cause scandal and offence, give no evidence from which such a conclusion can be drawn. They in fact rely on the character, nature, and proposed position of the thing itself, and they hold that it would be likely to receive superstitious regard and reverence, and would be in danger of being abused; if they are right in this conclusion the thing would be illegal, and the faculty must be refused — if not — nothing remains upon which to exercise a legitimate discretion in refusing it. I therefore proceed to examine the question of legality. It was not thought necessary in argument, nor can it be desirable in judgment, to do more than revert to the principles and distinctions established in the late decisions on the subject. I repeat, therefore, here what I stated in the case of *Clifton* v. *Ridsdale* (1), that the Court of Appeal in *Boyd* v. *Phillpotts* (2), in authorizing the reredos set up in Exeter Cathedral, pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for decoration only, declaring that it was not in danger of being abused, and that it was not suggested that any superstitious reverence had been or was likely to occur to any of the figures upon it." I quote these words now because the Court of Appeal in *Clifton* v. *Ridsdale* (3) approved them, and they embody the principle which was applied in that case, and has to be applied in this. In doing so the first observation that occurs is this, that the disputed sculpture is unquestionably in its general character an architectural decoration; it consists of arches, pillars or columns, and figures sculptured on a solid stone in relief depicting the scene of the crucifixion, in which the figures and postures

(1) 1 P. D. 316. (2) Law Rep. 6 P. C. 435. (3) Ante, p. 276.

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of those who are standing by the cross are matters of artistic treatment. It is, moreover, part of a larger architectural decoration forming one compartment only out of three, the other two being of a similar character, though from the nature of their subjects free from objection. (1) This, in my judgment, at once establishes a considerable distinction between the present case and that of *Clifton* v. *Ridsdale* (2), where the crucifix could hardly be said to constitute an architectural decoration at all, or, at any rate, did not appear in the opinion of the Court to have been set up for that purpose. This distinction, however, is far from deciding the case, for it remains to be considered whether, whatever be the purpose for which the sculpture in question is proposed to be erected, and how fitly soever, it may be described as an architectural decoration, it is nevertheless in danger of being abused and "superstitious reverence" likely to be paid to any of the figures upon it.

It is upon this that the strain of the argument against it has been rested, and it has been put in this way. Books, presumed to be of authority in the Roman Church, have been cited to shew that a crucifix has always, according to the usage of that Church, been required to be placed on the altar during the celebration of the Mass (for this purpose I quote from the French translation of the Institutiones Liturgicæ of Fornici, edition 1851, p. 35). (3) "Que, pendant le sacrifice non sanglant, l'image du Christ attachée à la croix rappelle au prêtre et aux fidèles le souvenir de sa Passion." This usage the author declares in the same page to be a very ancient one: "constaté dans un concile tenu à Tours en A.D. 567, et d'après une tradition qui remonte aux Apôtres." The author goes on to say in the page following that "L'usage contraire a été frappé de réprobation par un décret de la Congrégation des Rites;" and then follows this passage: "La même Congrégation avait aussi décrété qu'il n'est pas besoin d'une autre

(1) It appeared from a printed description of the reredos that the right hand or north panel of the reredos represented the gathering of the manna; and the left hand or south panel the bearing of the cluster of grapes of Eschol between two men upon a staff.

(2) 1 P. D. 316; ante, p. 276.

(3) Institutions liturgiques à l'usage du clergé en général et des séminaires en particulier, rédigées en latin pour les séminaires, . . . traduites par M. Boissonet.

croix, pendant la célébration de la messe, s'il y a dans l'architecture qui surmonte l'autel une grande statue du Jésus attachée à la croix."

It was argued accordingly that the figure of Christ on the cross, contained in the central compartment of the sculpture which is under consideration, would, if in a Roman Catholic church, properly supply the place of a crucifix on the altar, and it was sought to be inferred therefrom that such a decoration was likely, in the Protestant church now under consideration, to fulfil the same office as in a Roman Catholic church, and was therefore in danger of abuse. I think it is clear that such a thing might be, but that is not enough, it must appear to the Court that it is probable. The case is singularly bare and destitute of all collateral or ancillary facts which might help the Court to such a conclusion. There is no evidence that, either in the arrangements or decorations of the church, or anything that has taken place since it was consecrated, a fair reason has been disclosed for any such apprehension. The probability of abuse, therefore, rests entirely on the character and position in the church of the thing itself. It is worth while, before adopting an affirmative conclusion on this probability, to consider how far it would carry the Court, and to contemplate for a moment the cases that would fall within the range of similar apprehensions. All pictures or painted windows in a position above the communion table, upon which, whether in an isolated form or in conjunction with other figures, forming a group or scene, the figure of our Saviour on the cross appeared, would be condemned, and yet such pictures and delineations have been certainly not infrequent in our churches from even distant periods of time. The window of St. Margaret's Church, Westminster, is a familiar instance. No doubt the events of more recent time have given rise to much natural distrust on this subject; on the other hand, the frequency of such decorations, and the length of time during which they have existed without evil results, goes far to exempt them from precipitate condemnation. But, again, if the crucifixion is a forbidden subject, can the Court stop there? Would not every work of art similarly placed and circumstanced containing the figure of our Saviour form the subject of similar inferences and the ground of similar fears, and yet

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at this point the argument is met by the decided case of the Exeter reredos (1) which, in its general features, was entirely like the reredos in question, the difference being that in the central compartment the Ascension was delineated in the place of the Crucifixion: and that reredos was held to be lawful. Is it reasonable then to say that the figure of our Saviour in the Crucifixion is likely to be superstitiously regarded, but that the same figure in the Ascension is open to no such danger? I think not; and though it is quite possible that the distinction to be drawn in matters of this kind cannot always be very broad and clearly marked, such a distinction as this could not, I think, be supported. What, then, to sum up these considerations, are the materials upon which a judgment has to be formed? The proposed erection is a fitting and natural architectural ornament. It is proposed to be placed in a part of the church where ornaments of the kind are not unfrequently found. It is not an isolated figure, but a group capable of artistic treatment. It differs only from a very similar erection which has been held lawful at Exeter, in the circumstance that it pourtrays the Crucifixion in the place of the Ascension, and it differs not at all in essentials from other representations of the Crucifixion which have hitherto been found harmless, such as that which has stood for so many years in St. Margaret's Church, Westminster. Why then, without more, it may be asked, why, without further evidence, should the probability of its abuse to superstitious purposes be declared to be established? I do not conceal from myself that this question is one upon which there is room for much difference of opinion; but a great deal depends upon the attitude of mind in which the subject is regarded; things innocent in themselves soon take another complexion if viewed in a spirit of distrust, and the possible soon passes into the probable under the eyes of an over jealous vigilance. Dispassionately considered, the circumstances of the case require me to declare that the illegality of this decoration is not established, and that a faculty for its erection ought to be granted. It remains to say a word upon the dado proposed to be placed on either side of the reredos, and for which a faculty is also asked on this application. The petitioners have failed in their petition to give more than a general descrip-

(1) *Boyd* v. *Phillpotts*, Law Rep. 6 P. C. 435.

tion of the intended work, and they did not, as I understand, annex to that petition any plan or drawing from which the details of it could be ascertained. It is true that at the hearing of the cause they have supplemented the defect by producing a drawing which appears harmless. But as the objection has been taken, I think I am bound to hold that the particulars and details now given should have been shewn in the petition. If this had been done it would have then been competent to all persons interested to come forward and make their objections, if they had any. Whereas, if I were to grant the faculty now with the drawing annexed I might do so, in ignorance of objections, which if they did not go to its legality, might affect the discretion of the Court. The requisite faculty for the dado, therefore, must be the subject of a fresh application which will in all probability be unopposed.

Proctor for petitioners: *Brooks.*
Proctor for respondent: *Tebbs.*

REGULÆ GENERALES.

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RULES AND REGULATIONS

(*Made in pursuance of* 10 *George* 4, *cap.* 53, *sec.* 9; *and also approved by the Lord Bishop of London*)

TO BE OBSERVED

IN ALL CAUSES, SUITS, OR PROCEEDINGS

INSTITUTED IN

THE CONSISTORY COURT OF LONDON.

ORDER I.

COMMENCEMENT OF SUITS, CITATIONS, &c.

THE Vicar General and Official Principal in and throughout the Diocese of London having considered it expedient that certain of the existing Orders and Regulations now observed in the Proceedings of the Consistory Court of London should be amended, and that Additional Orders should be made for further expediting and regulating the said Proceedings, does hereby order and direct that the following Rules and Regulations, (in lieu of the existing Rules and Regulations) shall be observed from and after the 26th of June, 1877.

1. The Form of Proxy appointing a Proctor in a Suit shall be in the Form annexed.

2. All Decrees, Citations, Monitions to enforce decrees or orders of Court, Inhibitions, Compulsories, and other Instruments under seal, shall be issued from the Registry of this Court, in Forms to be approved of by the Judge, on written application (from the Proctor of the Party or Parties requiring the same, and signed by

him), and no Act of Court shall be necessary to lead such Decrees, Citations, Monitions, Inhibitions, Compulsories, or other Instruments, and the same shall bear date on the day on which they are respectively issued.

3. Applications for leave to commence proceedings by Monition for the purpose of obtaining an order of Court to restrain the Commission of an Act contrary to Ecclesiastical Law, or to compel the performance of any duty, or for the purpose of obtaining an order of Court in any matter in respect of any Church, Chapel, Churchyard, or Consecrated Burial Ground, or in respect of the furniture or ornaments in any Church or Chapel, shall be made ex parte to the Judge in Court or in Chambers, and an affidavit shall be filed in support of such application, and the Monition shall upon an order being made by the Judge for that purpose issue from the Registry in such form as the Judge shall ap rove, and every such Monition shall in the first instance be an order to show cause at such time as the Judge shall name in such Monition, and if no sufficient cause be shown, the Judge shall make such order in the matter as shall be just.

4. All Decrees, Citations, Monitions, Inhibitions, Compulsories, and other Instruments heretofore returnable or brought into Court or in Chambers, shall be returnable or brought into the Registry of the Consistory Court, and the said Decrees, Citations, Monitions, Inhibitions, Compulsories, and all other Instruments so returned or brought into the said Registry, shall have the same full force and effect in Law as the like Instruments have heretofore had when returned into Court.

5. All such Instruments shall be so returnable on the third day after service. The Proctor shall file his Proxy in the Registry on the day on which he returns his Decree.

6. The return of all Instruments into the Registry shall be entered by the Registrar on the day on which they are so returned in a book to be kept for that purpose.

7. An Appearance shall be entered in the Registry by the Proctor for the party cited within six days after the return of the Decree or Citation, and if no such Appearance be entered within that time it shall be competent to the party promoting the suit to proceed in default of such Appearance, but an Appearance may

be entered at any time during the dependance of the suit with the consent of the Judge in Chambers.

8. On an Appearance being entered a duplicate copy thereof shall be given to the Proctor returning the Decree, who shall file his Articles, Libel, or Petition, in the Registry, within six days from his having such notice, and deliver a copy thereof to the Proctor for the party cited.

9. Where a party has entered an Appearance, the Judge may at any time before judgment order the Decree, Citation, or Monition to be amended, subject to such terms as to costs or otherwise as he shall deem just.

ORDER II.

PLEADINGS.

1. Every Pleading shall contain as concisely as may be the statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved, such pleadings being divided into separate articles or paragraphs, and shall be headed in the Form annexed.

2. Every Pleading shall be deemed to be admitted, unless the opposite party gives notice within eight days of the delivery of the same that he objects to its admission, and an order is made for its rejection or amendment.

3. A party objecting to the admission of any Pleading shall within eight days after the delivery to him of the copy of such Pleading, file in the Registry, and deliver to the opposite party, a Notice specifying his objection to the Pleading, and the opposite party shall without any leave be at liberty to amend his Pleading for the purpose of meeting such objection; and in default of his making within eight days of the delivery of such notice such amendment as shall satisfy the objector, the Judge shall appoint a day to hear and determine in Chambers the objection to such Pleading.

4. Pleadings in Answer, and subsequent Pleadings, shall be filed and delivered within eight days from the delivery of the last preceding Pleading.

5. A party appearing to a Monition issued under Order I.,

Rule 3, shall not be entitled to plead to the same without leave granted by the Judge in Chambers, and on cause being shewn both parties shall be at liberty to file affidavits and examine witnesses in support of their respective cases.

ORDER III.

AMENDMENT OF PLEADINGS.

1. The Judge may at any stage of the Cause allow either Party to alter his Pleadings, and shall order all such Amendments as may be necessary for the purpose of determining the real question in controversy.

2. The Plaintiff may without any leave amend his Articles, Libel or Petition, at any time before the expiration of the time limited for Pleading in reply, or where the Defendant has filed no Pleading in Defence, at any time before the Cause is set down for hearing, subject to filing in the Registry and to service on the Defendant of a copy of such amended Pleading.

3. The Defendant may amend his Pleading in Defence without any leave at any time before the expiration of the time allowed him for Pleading to the Reply.

ORDER IV.

APPLICATIONS FOR FACULTIES.

1. In proceedings for Faculties the Petition filed by the Applicant shall be treated as the first Pleading in the Cause.

2. An Answer to the Petition for a Faculty shall state one or more grounds of objection to the granting of the Faculty, but the Party opposing the Faculty shall not be precluded at the hearing of the Cause (but subject to such terms as to adjournment and otherwise as the Judge shall order) from taking further grounds of objection.

3. Where an Appearance has been entered, but no answer filed within eight days of the entry of such Appearance nor leave obtained for further time to plead, the Judge shall fix a day for hearing in Court the application for the Faculty, of which each party shall have notice, and the party who has entered the

Appearance may be heard either by Counsel or in person, and produce evidence in opposition to the Faculty, but subject to such terms as to adjournment and otherwise as the Judge shall order.

4. In opposed Faculty Cases, or in cases in which the Judge has directed the Faculty to be moved for in Court, the Faculty shall be moved for in Court by Counsel, or by a Petitioner in person.

ORDER V.

SPECIAL CASES.

1. The Parties may after the return of the Decree, Citation, or Monition, and the entry of an Appearance by the party cited, concur in stating the questions of law arising in the Suit in the form of a Special Case for the opinion of the Judge. Every such Special Case shall be divided into paragraphs numbered consecutively, and shall concisely state such Facts and Documents as may be necessary to enable the Judge to decide the questions raised thereby. Upon the argument of such Case, the Judge and the Parties shall be at liberty to refer to the whole contents of such Documents, and the Judge shall be at liberty to draw from the Facts and Documents stated in any such Special Case any inference, whether of Fact or Law, which might have been drawn therefrom if proved at a trial.

ORDER VI.

SETTING DOWN THE CAUSE.

1. Upon the conclusion of the Pleadings, the Plaintiff shall set down the Cause for hearing in the Registry, and on the same day give Notice thereof to the Defendant, and in default of the Plaintiff setting down the Cause within ten days of the conclusion of the Pleadings, the Defendant shall be at liberty to set it down, giving like Notice to the Plaintiff.

ORDER VII.

AS TO MARRIAGE LICENSES.

1. No party shall be heard in objection to the granting of a Marriage License until he has entered an Appearance in the Registry.

2. Objections to the granting of a Marriage License shall be heard summarily without Pleadings, and at such time as the Judge shall appoint.

ORDER VIII.

REVISION OF FEES FOR MARRIAGE, BURIALS, &C.

1. Application for the Revision, or approval of, a Scale of Fees for Marriages, Burials, &c., shall be made to the Judge by Petition, to be signed by the Applicant or Applicants, and to be filed in the Registry. Forms of the Petition will be supplied on application at the Registry.

2. Any Parishioner shall, on entering an Appearance in the Registry, be entitled to be heard in opposition to the said Application.

3. The Applicant shall, before the Judge makes any order on his Petition, give such notices and produce such evidence as the Judge shall direct.

4. The Petition shall be heard in Court if the Judge shall so direct.

ORDER IX.

AS TO WITNESSES.

1. In the absence of any agreement between the parties, the Witnesses at the hearing of any Cause shall be examined vivâ voce and in open Court, but the Judge may for sufficient reason order any particular fact or facts to be proved by affidavit or allow the affidavit of any Witness to be read at the hearing on such conditions as the Judge may think reasonable; or may order any Witness, whose attendance in Court ought for some sufficient causes to be dispensed with, to be examined before an Examiner of the Court, or a Commissioner acting under a Commission from the Court.

2. In all cases where Witnesses are examined by an Examiner of the Court, they may be produced and sworn before a Surrogate in default of the appearance of the other Proctor or party, if he refuse or neglect to attend after having received written notice thereof.

3. All Examinations and Cross Examinations before an Examiner or a Commissioner may be conducted either by Counsel or Proctors, or by the Examiner or Commissioner upon Interrogatories as the Proctors may determine, and where Counsel are employed the Fees of one Counsel may be allowed on Taxation.

4. In any Compulsory requiring the attendance of Witnesses, it shall be competent to insert a clause (where applied for) requiring any Witness or Witnesses to produce any paper, book, or document that may be considered material to the interest of the Cause.

5. In all cases where Documents or Papers in possession of either party are required to be produced at the hearing of the Cause, a Notice shall be left in the Registry and served on the other party, signed by the Proctor of the party, requiring their production three days at least before the hearing of the Cause.

ORDER X.

TAXATION OF COSTS.

1. When either of the parties is condemned in costs, the Proctor shall lodge his Bill of Costs in the Registry, and deliver a copy thereof to the other Proctor within twenty-one days from the day of the Decree.

2. The Registrar shall give notice to both Proctors of the time appointed for taxing the said Bill, and may proceed to do so (after such notice) in the absence of the Proctor of the party condemned in costs, and on the completion of such Taxation shall enter in the Notice Book his report of the amount to be allowed in respect of such costs.

3. If either of the Proctors object to such Taxation, notice thereof shall be left in the Registry within ten days from the day of such Taxation, and the same shall thereupon be referred to the Judge, who may hear and determine on such objection in Chambers, but if no such notice be left, the Registrar's Taxation shall be conclusive.

4. If the Proctor whose Bill of Costs has been taxed requires a Monition to enforce the payment thereof, he shall lodge a written application in the Registry, and leave a copy thereof with the other

Proctor within fourteen days from the time of the Registrar's Taxation or Judge's decision thereon, as the case may be.

ORDER XI.

1. If a Proctor wishes to apply to have a party pronounced in contempt for not having obeyed any Decree, Citation, Monition, Inhibition, Compulsory, or other Order of the Court, he shall leave a notice in the Registry containing full particulars of such intended application, and whether any and what notice thereof has been given to such party, and the date thereof.

2. In case of a party appearing in person in any Suit, either as Promoter or Defendant, the foregoing Orders shall be applicable to and observed by such party as far as circumstances will permit.

3. All Notices, Declarations, &c., required by the foregoing Rules to be given by Proctors, shall be so given in Forms to be approved of by the Judge, and shall bear date on the day on which they are left in the Registry, and shall be signed by the Proctor or his substitute, and copies or duplicates of such Notices, &c., shall be given on the day they are so dated and left in the Registry, to the other Proctor in the Cause.

4. It shall be competent to the Judge, on application in Chambers, supported by Affidavits, if necessary, to shorten or extend the times fixed by these orders or practice.

5. The Registrar will enter in a book to be kept for that purpose the dates when the several Papers, Notices, &c., are filed and the other proceedings taken, and report to the Judge in case of any delay or non-compliance with these Orders, who shall thereupon make such Orders for expediting the proceedings as he may see fit.

6. The Notices and Forms annexed to these Orders shall be followed as near as the circumstances of each case will permit.

7. Where no other provision is made by the foregoing Orders, the present procedure and practice remain in force.

8. The foregoing Orders shall extend to all Causes pending, so far as the same are applicable.

FORMS *of* NOTICES *and* INSTRUMENTS *to be adopted as nearly as the circumstances of each case will allow.*

No. 1.

FORM OF PROXY.

I, *A. B.* of in the county of hereby nominate and appoint *C. D.* of Doctors' Commons, London, Proctor, to be Proctor for me in a Cause I am about to institute in the Consistory Court of London against *E. F.*, or in a Cause now depending in the Consistory Court of London, entitled (as the case may be.)

In Witness whereof I have hereunto set my hand and seal this day of

No. 2.

FORM OF APPEARANCE.

In the Consistory Court of London.

The Office of the Judge promoted by *A. v. B.*
or *A. v. B.*

I, *C. D.* Proctor, do hereby appear on behalf of *B.* or *D.* the party cited, and pray Articles—or Libel.

Dated

C. D.

FORM OF NOTICE OF OPPOSING ADMISSION OF ARTICLES OR PLEAS.

In the Consistory Court of London.

The Office of the Judge promoted by *A. v. B.*
or *A. v. B.*

I, *C. D.* Proctor for the Promoter [Defendant], do hereby declare that I oppose the admission of the Articles, Libel, or [Plea], on the following grounds.

Dated

C. D.

Notice as to proving the Case Orally.

In the Consistory Court of London.

The Office of the Judge promoted by *A. v. B.*
or *A. v. B.*

I, *C. D.* Proctor for do hereby give Notice that it is my intention to produce Witnesses for Examination *vivâ voce* in open Court, or [before an Examiner], or [before a Commissioner], and I pray a Commission for taking such Examination, to be addressed to to be opened on at to be closed on or before and to be returned by

C. D.

Form of Application for Compulsories.

In the Consistory Court of London.

The Office of the Judge promoted by *A. v. B.*
or *A. v. B.*

I, *C. D.* Proctor for the [Promoter] or [Respondent] pray Compulsories requiring to appear before the [Judge of the above Court] or [an Examiner] or [Commissioner duly appointed] at on to undergo Examination, and then and there to produce [here enumerate the Papers, &c. if any.]

Dated

C. D.

Compulsory.

John, by Divine Permission, Lord Bishop of London, to all Clerks and Literate Persons whomsoever and wheresoever in and throughout the whole Diocese of London, Greeting. Whereas, in a certain Cause now pending in our Consistory Court, before the Worshipful Thomas Hutchinson Tristram, Doctor of Laws, our Vicar General and Official Principal, promoted by against application has been made for Compulsories, citing certain Witnesses to attend and undergo their examination, and also for the production of certain papers, we do therefore hereby authorize,

empower, and strictly enjoin and command you jointly and severally peremptorily to cite, or cause to be cited, *A. B. C.* and *D.* to appear personally before us, our Surrogate, or other competent Judge in this behalf, in the Chapter Room of the Dean and Chapter of our Cathedral Church of St. Paul's in St. Paul's Church Yard in the City of London, and place of judicature, there on the day of next ensuing, at the hour of the sitting of the Court, and there to abide, if occasion require, during its continuance, and also on such subsequent Court day or days as may be appointed for the examination of Witnesses in the said cause, then and there to take the oath by Witnesses usually taken, and to testify to the truth of what they know in the said Cause. [And we do further enjoin and command you to monish and require the said *D.* then and there to produce], and further to do and receive as unto Law and Justice shall appertain, under pain of the Law and contempt thereof. And what you shall do or cause to be done in the premises, you shall duly certify into our Registry, situate No. 3, Godliman Street, Doctors' Commons, in the City of London, together with these presents. Dated at London, the day of in the year of our Lord one thousand eight hundred and

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FORM OF PLEADING.

In the Consistory Court of London.

A. B. promoter or plaintiff.

C. D. defendant.

Libel of Plaintiff filed by E. F. his Proctor.

1. *A. B.* is a Parishioner of the Parish of in the Diocese of London, &c.

The Plaintiff prays the Court to decree [1.] That (state relief prayed.)

AT THE COUNCIL CHAMBER, WHITEHALL,
the 15th November, 1876.

To the Queen's Most Excellent Majesty:

We, the undersigned Archbishops and Bishop, Members of your Majesty's Privy Council, and we, the undersigned Members of the Judicial Committee of your Majesty's Privy Council, humbly recommend to your Majesty that the following be the Rules under the Appellate Jurisdiction Act, 1876, by which it is enacted that your Majesty may, by Order in Council, with the advice of the Judicial Committee of your Majesty's Privy Council, or any five of them, of whom the Lord Chancellor shall be one, and of the Archbishops and Bishops being Members of your Majesty's Privy Council or any two of them, make Rules for the attendance on the hearing of Ecclesiastical Cases as Assessors of the said Committee of such number of the Archbishops and Bishops of the Church of England as may be determined by such Rules, and that the Rules may provide for the Assessors being appointed for one or more year or years, or by rotation, or otherwise, and for filling up any temporary or other vacancies in the office of Assessor:

I.

The Archbishop of Canterbury, the Archbishop of York, and the Bishop of London shall be ex officio Assessors of the Judicial Committee of Her Majesty's Privy Council on the hearing of Ecclesiastical Cases according to the following rota, that is to say, the Archbishop of Canterbury from this day until the 1st of January, 1878; the Archbishop of York from the 1st of January, 1878, till the 1st of January, 1879; and the Bishop of London from the 1st of January, 1879, until the 1st of January, 1880, and so on by a similar rotation for the period of one year each.

II.

The other Bishops of Dioceses within the provinces of Canterbury and York shall attend as Assessors of the Judicial Committee on the hearing of Ecclesiastical Cases according to the following rota, that is to say, from this day until the 1st of January, 1878, the four Bishops who on this day are the four junior Bishops for the time being; seniority for the purpose of this Order to be reckoned from the date of appointment to the Episcopal see; from the 1st of January, 1878, till the 1st of January, 1879, the four Bishops who on the 1st of January, 1878, shall be the four Bishops next in order of seniority; and from the 1st of January, 1879, till the 1st of January, 1880, the four Bishops who on the 1st of January, 1879, shall be the four Bishops next in order of seniority, and so on by a similar rotation until the senior Bishop for the time being is reached, when the rotation shall be carried back to and again commenced with the junior Bishop.

III.

In the event of any one, or more than one, vacancy occurring in the office of Ecclesiastical Assessor, the vacancy or vacancies shall be filled up by the person or persons then next according to the rotations aforesaid.

IV.

A summons to attend on the hearing of every Ecclesiastical Case about to be heard before the said Judicial Committee shall be issued to the five Ecclesiastical Assessors for the time being; and no such case shall be heard before the said Judicial Committee unless there are at least three of such Assessors present at the hearing: Provided that the Assessors present at the commencement of the hearing of any such case shall continue to be the Assessors for that case until it shall be fully heard and disposed of, although their term of office, according to the rotation aforesaid, may in the meantime have expired: Provided also that in the event of the death, resignation, or absence, by reason of illness or other unavoidable cause, of any one of the Assessors

present at the commencement of the hearing, the hearing of the case may proceed so long as at least two Assessors are present.

(Signed) A. C. Cantuar.
Cairns, C.
W. Ebor.
J. London.
Selborne.
Coleridge.
Robert J. Phillimore.
W. M. James.
B. Peacock.
George Mellish.
R. P. Collier.
James Hannen.
H. S. Keating.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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1 Ch. D.

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1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

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2. —— *Administration to Creditor—Bond to Pay pro ratâ not applied for—Practice—Future Practice.*] Where administration has been granted to a creditor and no application was made at the time the grant issued that the administrator should pay the debts rateably, the Court will not revoke such grant subsequently in order to compel such administrator to give up his right to retain assets sufficient to repay himself his own debt in full.—For the future, a creditor on taking out administration must, in all cases if required by the Court, enter into a bond conditional to administer the estate rateably amongst the creditors of the deceased In the Goods of Brackenbury [272

3. —— *Supreme Court of Judicature Act, 1875, s. 22—Annexing Exception to the Record.*] The Judge of the Probate Division having directed a jury to find in favour of a will, on the ground that the facts proved were no evidence of its having been revoked, and having pronounced in favour of the will, directed an exception to his ruling to be annexed to the record. There being no record to which it could be annexed, the Court of Appeal directed notice of appeal to be given. In re Harris. Cheese *v.* Lovejoy - 161

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2. —— *Appointment of Executors — Uncertainty.*] The testator, by his will, appointed one of his sisters sole executrix. He had three sisters living at that time, but two died in his lifetime:—*Held*, that the appointment was void from uncertainty. In the Goods of Blackwell - 72

3. —— *Codicil—Erroneous Reference by Date.*] The testatrix being desirous to revive a will and codicil which had been revoked by a will of later date, sent them to her solicitor, in order that he might prepare a new will for that purpose. To save time he directed his clerk simply to re-copy them, which the clerk did, including the reference by date of the codicil to the first will. In this state the will and codicil were executed on the same day:—*Held* that as there was no distinct intention expressed in the codicil to revoke the last will, the probate should be granted of it, together with the codicil. In the Goods of Ince [111

4. —— *Conditional — Clause of Revocation.*] The deceased made a will, by which he left all his property to his wife, and made her sole executrix. He subsequently, with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time and by one and the same accident. By this will they revoked all former wills. The deceased died in the lifetime of his wife:—*Held*, that the joint will was dependent upon a contingency which did not happen, and was,

WILL—*continued.*

therefore, inoperative even to revoke a previous will. In the Goods of Hugo - - 73

5. —— *Executor according to the tenor.*] The testatrix executed a will, which contained a clause to the effect, "I appoint my sister A. B. my executrix, only requesting that my nephews C. D. and E. F., will kindly act for and with this dear sister":—*Held*, that C. D. and E. F. were executors according to the tenor of the will. In the Goods of Brown - - - - 110

6. —— *Holograph — Valid according to the Law of the Place where made—Incorporation—* 24 *&* 25 *Vict. c.* 114, *s.* 1.] The deceased, a Frenchman by birth, but naturalized in England, executed at Paris a will and codicil in the English form relating to his property in England only, and a holograph will, signed and dated, disposing of his property in France, but referring directly to the English will. He died at Paris:—*Held*, that if it could be shewn that the will and codicil in the English form were made in a form permitted by the law of France in the case of British subjects resident in France, they could be admitted to probate under 24 & 25 Vict. c. 114, s. 1, as valid according to the law of the place where made. In the Goods of Lacroix - - 94

7. —— *Lithographed — Alterations — Not noticed by Witnesses—Declarations before Execution —Presumption.*] The testator having obtained the lithographed form of a will by which the property was left to all the children absolutely on the death of the wife, filled up the blanks in his own handwriting, and in the place of the bequest to the children interlined the words "To my only son A. B." The bequest to all the children was cancelled by a line drawn through it. No reference was made to the alterations in the attestation clause, nor were any initials placed in the margin to identify them. The surviving attesting witness had no knowledge whether the alterations were made at the time of execution. The testator had one child, a son, by the second wife, who took a life interest under the will, and five children by a previous marriage. The Court held that the presumption arising from the ignorance of the witness was rebutted by a declaration of the testator, made previous to the execution of the will, that he intended to provide for the child of the

WILL—*continued.*

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8. —— *Lost—Copy—Evidence.*] Declarations of a deceased person, who has been in possession of property claiming a limited interest therein under a particular will, are admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein. And where a copy of such will, the original not being forthcoming, is found in the possession or amongst the papers of the legal adviser of one of such executors, it is evidence of the contents of such will, and may be admitted as such. Sly *v.* Sly and Dredge - - 91

9. —— *No Residuary nor Revocatory Clauses —Earlier Will disposing of the whole of the Property—Incorporation.*] The deceased executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced "this is the last will and testament of me," &c. It varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses:—*Held*, that, from the general tenor of the last will, it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked. Dempsey *v.* Lawson - - - - - - 98

10. —— *Revocation*—7 *Wm.* 4 *&* 1 *Vict. c.* 26, *s.* 20—"*Otherwise destroying.*"] A testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured:—*Held*, that the will was not revoked, the words "or otherwise destroying" in 7 Wm. 4 & 1 Vict. c. 26, s. 20, not being satisfied, as, whatever the testator intended, the will had not been actually injured. Cheese *v.* Lovejoy [C. A. 251

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DAMAGES—*Apportionment.*] A sum of 5000*l.* damages was apportioned by the Court as follows:—1500*l.* was settled on the youngest child of the marriage, aged five years, the only one remaining in petitioner's custody; 1500*l.* was given to the petitioner and also his costs of the suit in addition to those which had been taxed against the co-respondent: the balance was invested in the purchase of a life-annuity for the respondent, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent; and in the event of her breaking either of those conditions, to be paid to the petitioner. Meyern *v.* Meyern - - 254

DISSOLUTION OF MARRIAGE — *Variation of Settlements—Power of Trustees to advance Money to Respondent—Power of the Respondent to revoke and reappoint a portion of the Trust Fund—Appointment of new Trustees.*] In a suit for dissolution of marriage brought by the wife, a decree absolute having been made, application was made to the Court to vary the settlements executed on the marriage of the parties:—*Held*, that the the object of the Court, in varying the provisions of a settlement, should be to prevent, as far as may be just and practicable, the innocent party being damaged, in a pecuniary sense, by the decree of dissolution. It will not deprive the father of the power of exercising parental judgment and discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother. Maudslay *v.* Maudslay - - - - - - 256

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NULLITY OF MARRIAGE — *Consanguinity — First Cousins—Marriage illegal by the Law of Domicile.*] The petitioner and respondent, Portuguese subjects and first cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the city of London. In 1873 they returned to Portugal, and continued to reside there. By the law of Portugal a marriage of Portuguese subjects, being first cousins, without dispensation, wheresoever contracted, is invalid:—*Held*, that the Court of the place of contract of marriage is not bound to recognize the incapacities affixed by the law of the domicile on the parties to a contract of marriage, if such incapacities do not exist according to the lex loci contractûs, and to pronounce a marriage, otherwise valid, to be null and void by reason of such incapacity. Sottomayor *v.* De Barros - - - - 81

2. —— *Undue Publication of Banns—Parties previously divorced—Proper Name.*] The petitioner having obtained a decree dissolving her marriage with the respondent, subsequently remarried him. This second marriage was celebrated after publication of banns, in which the petitioner was described by her name of marriage, she having in the interval between the decree dissolving her first marriage and the celebration of the second usually passed by her maiden name. On an application to annul such marriage by reason of an undue publication of banns:—*Held*, that a name acquired by marriage can only be superseded by a reputed name in cases where the name had been so far acquired by repute as to obliterate the name acquired by marriage. Fendall *v.* Goldsmid - - - 263

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PRACTICE—*Appeal from Order for Alimony—Divorce Court Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 55, 56—*Judicature Act*, 1873, *s.* 19—*Appellate Jurisdiction—Act* 1876 (39 & 40 *Vict. c.* 59), *s.* 20.] The Court of Appeal has no jurisdiction to entertain an appeal from an order of the Judge Ordinary of the Divorce Court granting alimony, though the appeal was presented before the passing of the Appellate Jurisdiction Act. 1876; but the appeal must be brought to the full Court of Divorce. Wallis *v.* Wallis - - 141

2. —— *Appeal—Order for Custody of Children under* 22 & 23 *Vict. c.* 61, *s.* 4—*Appellate Jurisdiction Act*, 1876, *s.* 20.] An appeal from an order as to the custody of children made under 22 & 23 Vict. c. 61, s. 4, after a final decree for dissolution of the marriage of the parents, must be brought to the full Court of Divorce, and not to the Court of Appeal. Gladstone *v.* Gladstone **C. A. 143**

3. —— *Divorce Court—Power of Court of Appeal to order the Queen's Proctor to be served—Divorce Court Act*, 1860, *s.* 5—*Judicature Act*, 1873, *s.* 19.] The Court of Appeal has the same power as the High Court of Justice to order the Queen's Proctor to be served under the 5th section of the Divorce Court Act, 1860. Le Sueur *v.* Sueur - - - - - - 79

4. —— *New Trial in Divorce Court—Appeal from Refusal of Rule to shew Cause—Divorce Court Act*, 1860, *s.* 2—*Judicature Act*, 1873, *s.* 19—*Appellate Jurisdiction Act*, 1876, *s.* 20.] The Court of Appeal has no jurisdiction to entertain an appeal from an order of the Judge Ordinary of the Divorce Court refusing or granting a rule to shew cause for a new trial; but the appeal must still be brought to the full Court of Divorce. Westhead *v.* Westhead - - **C. A. 1**

5. —— *New Trial in Divorce Court—Appeal from Refusal of New Trial—Divorce Court Act*, 1860, *s.* 2—*Judicature Act*, 1873, *ss.* 16, 19—*Ap-*

PRACTICE—*continued.*

pellate Jurisdiction Act, 1876, *s.* 20.] The Court of Appeal has no jurisdiction to entertain an appeal from an order of the President of the Divorce Court granting or refusing a new trial; but the appeal must be brought to the full Court of Divorce, which has not been abolished by the Judicature Acts.—*Westhead* v. *Westhead* (ante, p. 1) adhered to. Robinson *v.* Robinson **C. A. 77**

6. —— *Suit for Dissolution by Wife—Counter-charges—Res judicata.*] In a suit for dissolution brought by the wife, the respondent made counter-charges of adultery against her. On the allegation that the charges so made were identically the same as those made in a previous suit brought by the husband, in which a jury had decided that the wife had not been guilty of adultery, the Court, on motion, was asked to strike out the paragraphs containing such charges:—*Held*, that in order that all the facts should appear on the pleadings, the proper course was for the petitioner to file a replication, so that the respondent might reply to it. Robinson *v.* Robinson - - - **75**

7. —— *Suit for Dissolution—Application to dispense with making Co-Respondents—Rules* 4, 5, 6, *Rules and Regulations*, 1866.] An application to dispense with making a co-respondent should be made at an early stage of the suit; but, except under special circumstances, it will be allowed even after the respondent has filed her answer to the petition. Jeffers *v.* Jeffers **90**

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36 & 37 Vict. c. 66, ss, 16, 19 - - **77**
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—— —— s. 19 - - - - **141**
See Practice.

39 & 40 Vict. c, 59, s. 20 - - **141, 143**
See Practice. 4.

TRUSTEES—Appointment of new - - **256**
See Dissolution of Marriage.

—— Power to advance money to Respondent **256**
See Dissolution of Marriage.

ECCLESIASTICAL.

ADVERTISEMENTS—Of Queen Elizabeth **354**
See Evidence.

ARCHITECTURAL—Adornment - - **361**
See Worship, Public. 1.

BISHOP—Refusal of, to institute - - **192**
See Practice. 3.

CASES—*Hibbert* v. *Purchas* (Law Rep. 3 P. C. 605) approved - - - - **276**
See Worship, Public. 2.

—— *Phillpotts* v. *Boyd* (Law Rep. 6 P. C. 435) approved - - - - **276**
See Worship, Public. 2.

—— *Ridsdale* v. *Clifton* (1 P. D. 316) followed
See Evidence. [354

CONTEMPT - - - - - **125**
See Practice. 2.

COSTS—Of proceedings in contempt - **125**
See Practice. 2.

—— Of duplex querela - - - **192**
See Practice. 3.

CRUCIFIX - - - - - **361**
See Worship, Public.

CRUCIFIXION—Representation of - **361**
See Reredos.

DECREE—Form of - - - - **354**
See Evidence.

DISOBEDIENCE—To inhibition - - **125**
See Practice. 2.

DUPLEX QUERELA - - - **192**
See Practice. 3.

EVIDENCE—*Advertisements of Queen Elizabeth—Form of Decree.*] The incumbent of a parish church was charged with wearing, when officiating in the Communion Service, certain vestments called respectively a chasuble, alb, amice, maniple, and stole. At the hearing of the suit the charge was proved; but it was submitted on behalf of the defendant that as the promoter had not proved the "Advertisements of Queen Elizabeth," he had failed to establish that the vestments were illegal:—*Held*, that the Court was bound to follow the ruling of the Judicial Committee of the Privy Council in *Ridsdale* v. *Clifton*, and that it was unnecessary for the promoter to prove the Advertisements. Combe *v.* Edwards [354

FACULTY—*Prescriptive Right to Pew*—3 & 4 *Wm.* 4, *c.* 71, *s.* 2.] A parishioner who claims a legal right by prescription to a pew in the nave of his parish church must, in order to displace the general right of the ordinary, not only shew that the pew has been occupied by him or his predecessors in title in respect of an ancient house in the parish for a period more or less extended, but must also prove, if any alteration or repair of the pew has been necessary, that such repairs or alterations were executed at the expense of those who at the time claimed the prescriptive right to it.— *Semble*, s. 2 of the Prescription Act, 3 & 4 Wm. 4, c. 71, does not apply to a claim by prescription to a pew in the nave of a parish church. Crisp *v.* Martin - - - - 15

INHIBITION—Disobedience to - - 125
See Worship, Public.

LEARNING—Insufficiency in - - 192
See Practice. 3.

MINISTER—Position of - - - 276
See Worship, Public. 2.

PEW—Prescriptive right to - - - 15
See Faculty.

PLEADING—Mode of stating fact - - 192
See Practice. 3.

PRESCRIPTIVE RIGHT TO PEW - - 15
See Faculty.

PRACTICE—*Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *s.* 9—*Jurisdiction—Service of Representation on Respondent—Enactment not merely Directory.*] The 9th section of the Public Worship Regulation Act, 1874, provides that unless the bishop, to whom a representation of illegal acts or omissions on the part of any incumbent within his diocese has been sent, shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, ... "he shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of, and shall then transmit the representation to the archbishop, who shall forthwith require the judge to hear the matter of the representation." By section 16 it is further provided that, if any bishop is the patron of the benefice held by the incumbent respecting whom a representation shall have been made, the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation. A representation, under the above Act, was sent to the bishop of the diocese on the 29th of August, 1876. The bishop received the representation on the 30th of August, and finding that the party complained of was the incumbent of a benefice in his patronage, forwarded it on the 15th of September to the archbishop of the province. On the 21st of October the archbishop transmitted a copy of the representation to the party complained of. The party complained of did not acknowledge the receipt of the copy of the representation so transmitted to him, and though subsequently personally served with a

PRACTICE—*continued.*

duplicate copy of the representation entered no appearance. Afterwards the archbishop required the judge to hear the matter of the representation:—*Held*, that the proceedings were void, and must be dismissed by the judge, for the provision as to the time within which a copy of a representation should be transmitted to the party complained of was imperative, and had not been complied with. Howard *v.* Bodington - 203

2. —— *Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *s.* 9—*Respondent in Contempt for Disobedience to Inhibition—Significavit—Writ de Contumace Capiendo*—53 *Geo.* 3, *c.* 127, *s.* 1—*Release*—3 & 4 *Vict. c.* 93, *s.* 1—*Costs of Proceedings in Contempt.*] After the hearing of the matter of a representation in which the vicar of a parish was the party complained of, a monition issued admonishing the vicar to abstain from certain unlawful ceremonies and observances during the performance of divine service in the parish church. The vicar disobeyed this monition, and was served with an inhibition under the Public Worship Regulation Act, 1874, inhibiting him for the term of three months from performing divine service within the diocese. Afterwards, and whilst the inhibition was still in force, the complainants applied to the Court on affidavits, which alleged that since the inhibition the vicar had performed divine service in the church, and had there continued the ceremonies and observances from which he had been admonished to abstain, and had also obstructed the curate appointed by the bishop of the diocese from entering the church, and prayed that the vicar should be pronounced contumacious. Thereupon the vicar was pronounced by the Court to be contumacious; and his contempt having been signified to the Queen in Chancery, he was arrested and imprisoned under a writ de contumace capiendo.—Shortly after the vicar had been thus arrested, divine service was, without any opposition being offered, performed in the church by the curate appointed by the bishop, and the complainants applied to the Court on motion that the vicar should be released:—The Court ordered that the vicar should be forthwith released without previous payment of the costs of his contempt, but without prejudice to any other remedy for such costs; and that such costs should be recoverable as costs in the cause. Hudson *v.* Tooth - 125

3. —— *Duplex Querela—Refusal of Bishop to Institute on the ground of Insufficiency in Learning—Responsive Plea—Mode of stating Facts—Standard of Learning—Costs.*] In the affidavit to lead the monition in a suit of duplex querela it was alleged that the promovent had been refused institution to a benefice by the bishop of the diocese on the ground of insufficiency of learning. —On application on behalf of the bishop the Court ordered that the suit should be tried not by act on petition and answer, but by plea and proof, and that the promovent should bring in his libel.—The libel of the promovent having been subsequently brought in, a responsive plea was filed on behalf of the bishop, alleging in effect that the promovent on applying to be instituted had been examined by direction of the bishop, and that the result of the examination had conscientiously

PRACTICE—*continued.*
satisfied the bishop that the promovent was non idoneous and minus sufficiens in literaturâ. Thereupon the promovent applied to the Court to reject the responsive plea.—The Court directed that the responsive plea should be amended, and that there should be on the face of the amended responsive plea such a statement of the grounds on which institution was refused as would enable the Court, assuming the facts to be true, to decide upon the validity of the objection taken to the promovent, and would enable the promovent to take issue on the truth of such facts.—Where in a suit of duplex querela the bishop justifies his refusal to institute on the ground that the promovent is minus sufficiens in literaturâ, it is for the Court to determine whether the standard up to which the bishop considers the ability of the promovent ought to come is such a standard as is required by law. Willis *v.* Bishop of Oxford - - - - 192

RELEASE - - - - - - 192
See Practice. 2.

REPRESENTATION—Service of - - 203
See Practice. 1.

REREDOS - - - - - - 361
See Worship, Public. 1.

RESPONSIVE PLEA - - - - 192
See Practice. 3.

RUBRIC—Ornaments - - - 276
See Worship, Public. 2.

SERVICE—Of representation on respondent 203
See Practice. 1.

STATUTES:
1 Eliz. c. 2, s. 25 - - - - 276
See Worship, Public. 2.
53 Geo. 3, c. 127, s. 1 - - - 203
See Practice. 1.
3 & 4 Wm. 4, c. 71, s. 2 - - - 15
See Faculty.
3 & 4 Vict. c. 93, s. 1 - - - 125
See Practice. 2.
37 & 38 Vict. c. 85, s. 9 - - - 125
See Practice. 2.
—— —— - - - - 276
See Worship, Public.

SIGNIFICAVIT - - - - 125
See Practice.

VESTMENTS - - - - - 276
See Worship, Public. 2.

WAFER BREAD - - - - 361
See Worship, Public.

WORDS—"Bread such as is usual to be eaten"
See Worship, Public. 2. [276

WORSHIP, PUBLIC — *Reredos — Architectural Adornment — Representation of the Crucifixion.*] A reredos, of which the central compartment consisted of a sculptured panel representing the crucifixion, having the figure of our Saviour on the cross and the figures of St. John and the three Marys on either side, all such figures being in high relief, was erected in a newly-built parish church. The bishop of the diocese refused to consecrate the church unless the central compartment of the reredos was removed, and it was accordingly removed, and the church was consecrated. Subsequently the churchwardens of the parish petitioned the ordinary for the grant of a faculty authorizing the replacement of such central compartment in the church, and the ordinary sent the case by letters of request to this court. The letters of request having been accepted, an appearance was entered for a parishioner, who opposed the grant of the faculty on the ground that the central compartment of the reredos proposed to be replaced would, if so replaced, be either illegal or likely to receive superstitious reverence and be abused, or be inexpedient and likely to cause scandal and offence.—The Court ordered a faculty to issue for the restoration of the central compartment of the reredos. Hughes *v.* Edwards - - - - - 361

2. —— 37 & 38 *Vict. c.* 85, *s.* 9—*Vestments—Position of the Minister whilst saying the Prayer of Consecration — Wafer Bread — Illegality of Crucifix* — 1 *Eliz. c.* 2, *s.* 25, *and Ornaments Rubric of* 1662.] The appellant was declared by an order of the judge of the Arches Court of Canterbury to have offended against the laws ecclesiastical, in respect of the four following matters :—(1.) The wearing during the service of the Holy Communion of vestments known as an alb and a chasuble.—(2.) The saying the prayer of consecration in the service of the Holy Communion while standing at the middle of the west side of the communion table, in such wise that the people could not see the appellant break the bread or take the cup into his hand.—(3). The use in the service of the Holy Communion of wafer bread or wafers, to wit bread or flour made in the form of circular wafers, instead of bread such as is usual to be eaten.—(4). The placing and unlawfully retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave :—*Held*, upon appeal to the Judicial Committee, with regard to the first charge, that the judgment of the Court below must be affirmed.—*Hebbert* v. *Purchas* (Law Rep. 3 P. C. 605) approved.—1 Eliz. c. 2, s. 25, must be read together with the order made thereunder by the Advertisements of the Queen in 1566, and the law so understood, acted upon, and enforced from 1566 to 1662 (excepting a brief interval) cannot be repealed without a distinct and repealing enactment or an enactment inconsistent and irreconcilable therewith. The Rubric Note of 1662 could not and did not purport to repeal the law and all that had been done under it, while the Act of 1662, 13 & 14 Car. 2, c. 4, s. 24, expressly confirms the Act of 1 Eliz. c. 2; nor is the rubric inconsistent with s. 25 of the latter Act read as if the order made thereunder had been inserted therein.—*Held*, with regard to the second charge, that a penal charge was not established against the appellant merely by proof that he stood while saying the prayer of consecration at the west side of the communion table, without further evidence that the people could not see him break the bread or take the cup into his hand.—The minister

WORSHIP, PUBLIC—*continued.*
during the prayer of consecration should so stand that he may in good faith enable the communicants present, or the bulk of them, being properly placed to see if they wish it the breaking of the bread and the performance of other manual acts mentioned in the rubric. The rule laid down in *Hebbert* v. *Purchas* (Law Rep. 3 P. C. 605), that he should stand at the north side of the table looking to the south, explained and approved.—*Held*, with regard to the third charge, that if it had been averred and proved that the wafer, properly so called, had been used by the appellant, it would have been illegal; but that upon averment and proof to the effect that "bread made in the form of circular wafers instead of bread such as is

WORSHIP, PUBLIC—*continued.*
usual to be eaten," affecting the shape and not the composition of the substance employed, the appellant was entitled to the benefit of the ambiguity in the form of the charge:—*Held*, with regard to the fourth charge, that in the absence of a proper faculty the crucifix was unlawfully set up and retained. No such faculty ought to be granted and the crucifix was ordered to be removed.—*Phillpotts* v. *Boyd* (Law Rep. 6 P. C. 435) approved. Ridsdale *v.* Clifton - - 276

WRIT de Contumace Capiendo - - 125
See Practice. 2.

—— Significavit - - - - 125
See Practice. 2.

ADMIRALTY.

AGREEMENT—Inequitable - - 5
See Salvage. 2.

APPEAL—Costs of - - - 187
See Practice. 2.

—— From county court - - - 186
See Practice.

APPEARANCE—Under protest - - 29
See Practice. 4.

ARTICLES 12, 17 - - - - 222
See Collision. 5.

—— **14, 16** - - - - - 8
See Collision. 4.

BOARD OF TRADE - - - - 224
See Salvage. 1.

BONA FIDE PURCHASE FOR VALUE - 243
See Co-ownership.

BURDEN OF PROOF - - - - 231
See Collision. 2.

CARGO—Liability of - - - 145
See Salvage. 5.

COLLISION—*Control of Dock-master—Harbours, Docks, and Piers Clauses Act*, 1847 (10 *Vict. c.* 27), *s.* 52—*Negligence of Master of Vessel entering Dock.*] The steamer *C.*, coming into the St. Katherine's Docks, fell against two barges, and drove them against a vessel called the *V.*, which was lying alongside the St. Katherine's Wharf; a skiff was between the *V.* and the wharf, and in such a position as not to be visible to those on board the *C.* By reason of the *C.* falling against the barges the *V.* was driven towards the wharf, and crushed the skiff against the wharf. At the time of the collision the *C.* was within the prescribed limits within which the jurisdiction of the dock-master extended, and she was coming into dock under the direction of the dock-master. A cause of damage was instituted in the City of London Court on behalf of the owner of the skiff and the owners of her cargo against the owners of the *C.* to recover for the damage done to the skiff and her cargo:—*Held*, on appeal (reversing the

COLLISION—*continued.*
judgment of the Court below), that the accident might have been avoided if the master of the *C.* had taken proper precautions in entering the dock, and that the *C.* must be condemned in the damage proceeded for. The Cynthia - 52

2.—— *Precautions to be taken by those in charge of Vessel about to be launched on the River—Burden of Proof.*] When a vessel is launched in a river, the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions, and of giving such notice as is reasonable and sufficient to prevent any injury to passing vessels.—Circumstances in which it was held that proper precautions had not been taken. The Andalusian - - - - - 231

3.—— *Vessel moored and Vessel driven from her Moorings by third Vessel—Duty of Vessel lying at Moorings during a Gale to have Chains bent and Look-out on Deck.*] During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to mooring buoys placed there by the harbour authorities. On the brig striking the steamer the ring of one of the buoys carried away, and the steamer got adrift, and drove down the river, and ultimately came in contact with and did damage to a barque, whose owners instituted a cause of damage against the steamer in the county court of Northumberland, to recover for the damage done to their vessel by the steamer.—At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, and that no look-out had previously been kept on deck, though it was known that the weather was getting worse:—*Held*, on appeal, affirming the decision of the Court below, that a defence of inevitable accident, set up by the owners of the steamer, was not sustained, and that the steamer was alone to blame for the collision. The Pladda [34

4.—— *Sailing Rules—Overtaking Vessel—Regulations, Articles* 14, 16—*English Channel—Proper Course.*] A vessel is overtaking another

COLLISION—*continued.*
vessel, within the meaning of articles 16 and 17 of the Regulations, and not crossing the other vessel, within the meaning of article 14, when she is going faster than the other vessel and is so much behind her as to be unable to see the side light of the other vessel.—In the English Channel the rules as to vessels at sea, and not the rules as to vessels in a river, apply; and in the English Channel there is no customary course for vessels. The Franconia - - - C. A. 8

5. —— *Sailing Rules—Regulations for Preventing Collisions at Sea—Articles* 12 *and* 17.] A ship and a barque were both on the port tack. The barque was the leading vessel, and had the wind three points free; the ship was close hauled and was overtaking the barque:—*Held*, that it was the duty of the vessel with wind free to keep out of the way of the other. The Peckforton Castle - - - - - 222

6. —— *Jurisdiction of Court of Admiralty to entertain Proceedings in rem against a Ship for Damages for Loss of Life*—9 & 10 *Vict. c.* 93, *s.* 2—"*Damage done by any Ship*"—*Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 7.] An action was instituted against a foreign ship to recover damages for the death of the husband of the plaintiff alleged to have been caused by a collision brought about by the improper navigation of the ship proceeded against:—*Held*, that the Court had jurisdiction to entertain the action, and on appeal this decision was affirmed by James and Baggallay, L.JJ. (Bramwell and Brett, L.JJ., dissenting). The Franconia - - - C. A. 163

CO-OWNERSHIP—*Fraud — Bonâ fide Purchase for Value—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 43.] An action of co-ownership was instituted on behalf of G. W. against a British vessel, and against J. H., defendant intervening. The statement of claim alleged, inter alia, that by bill of sale duly registered in 1867 the defendant, as sole owner of the vessel, transferred for valuable consideration a moiety of the same to one T. W., and that T. W., by a subsequent bill of sale duly registered in 1876, transferred the said moiety of the vessel to the plaintiff for value. The defendant, in his statement of defence, denied that he had at any time signed a bill of sale transferring any shares in the vessel to the said T. W., and alleged, inter alia, that if any such bill of sale had been registered, the same was made and registered fraudulently. At the hearing of the action the registration and execution of the bills of sale were proved. The Court thereupon directed that the question whether the fraud alleged could affect the rights of the plaintiff should be raised on demurrer. The plaintiff thereupon demurred to so much of the statement of defence as alleged fraud:—*Held*, that the demurrer must be sustained on the ground that the legal ownership in the moiety of the vessel having passed to the plaintiff for valuable consideration by the execution and registration of a bill of sale without notice of fraud, the plaintiff had thereby acquired a title to the same as against the defendant. The Horlock - - - 243

COSTS—Of appeal - - - - 187
See Practice. 2, 3, 5.

COSTS—*continued.*
—— Security for - - - - 115
See Practice. 3.

—— On discontinuance - - - 113
See Practice. 5.

COURSE—Proper - - - - 8
See Collision.

CROSSING VESSEL - - - - 8
See Collision. 1.

DAMAGE—*Delay—Loss of Market.*] Where, on account of defects in the ship, the voyage had been protracted, and in the meantime the market price of the goods shipped had fallen:—*Held*, reversing the judgment of the Admiralty Division, that the consignee could not recover damages for the loss of market. The Parana. C. A. 118

DOCK MASTER—Control of - - - 52
See Collision. 1.

DEFENDANT - - - 3, 29, 113, 115
See Practice. 3, 4, 5, 6.

DELAY - - - - - 118
See Damage.

DISCONTINUANCE OF ACTION - - 113
See Practice. 5.

DISTRIBUTION—Of salvage - 41, 45
See Salvage. 3, 4.

DUTY—Of vessel lying at moorings - 34
See Collision. 3.

ENGLISH CHANNEL - - - 8
See Collision. 4.

FOREIGN—Defendants resident abroad - 115
See Practice. 3.

FOREIGN VESSEL - - - - 239
See Jurisdiction.

FORFEITURE—*Intent to conceal British Character of British Ship—Sale to bonâ fide Purchaser for Value after Offence Committed, but before Seizure by the Crown—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 103, *sub-s.* 2.] A cause of forfeiture, under the 103rd section of the Merchant Shipping Act, was instituted on behalf of a British officer of Customs against a vessel seized for an alleged infringement of the provisions of that section. The plaintiff in his statement of claim in effect alleged that on the 18th of July, 1874, one of her owners, being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as defendant, a statement of defence and counter-claim was delivered on his behalf, which in the 7th paragraph thereof set up the defence, that on the 6th of July, 1876, the defendant became bonâ fide purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. The plaintiff demurred to the 7th paragraph of the statement of defence.—The Court sustained the demurrer, and held that the property in the vessel proceeded against was divested out of its

FORFEITURE—*continued.*
former owners, and vested in the Crown immediately on the commission of any of the offences in respect of which, under the provisions of the section, the penalty of forfeiture was imposed. The Annandale - - - 179

FRAUD - - - - - 243
See Co-ownership.

HARBOUR DOCKS AND PIERS CLAUSES ACT
See Collision. 1. [52

JURISDICTION—*Foreign Vessel—Co-ownership.*] An action of co-ownership was instituted on behalf of a foreigner against a foreign vessel. On the vessel being arrested an appearance under protest was entered for another foreigner, who applied that the action should be dismissed.—It appeared that the representative of the state to which the ship belonged declined to interfere, and the Court dismissed the action with costs. The Agincourt - - - - 239

—— - - - - - - 29
See Practice. 4.

—— - - - - - - 45
See Salvage. 3.

LIABILITY OF CARGO - - C. A. 145
See Salvage. 5.

LIFE SALVAGE - - - 145
See Salvage. 5.

LOSS—Of market - - - 118
See Damage.

MERCHANT SHIPPING ACT, 1854 45, 113, [145, 179, 224, 243
See Co-ownership; Forfeiture; Practice. 5. Salvage. 1, 3, 5.

MERCHANT SHIPPING ACT AMENDMENT ACT, 1862 - - -
See Salvage.

MOORINGS—Vessel lying at - - 34
See Collision. 3.

NECESSARIES—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 4—*Sale of Vessel to Purchaser with notice of Claim for Necessaries previously supplied.*] The statement of claim in an action of necessaries in rem alleged that in November, 1874, the plaintiff had supplied to the owners of the vessel proceeded against certain stores necessary for her equipment; that in September, 1876, whilst the amount due in respect of the said stores was still unpaid, forty-three sixty-fourth shares in the vessel had been transferred to the defendant in the action with knowledge and notice of the plaintiff's claim; that the plaintiff became owner of the shares subject to such claim; and that the value of the shares was increased by reason of the said equipment, and the owners of the vessel had derived benefit therefrom:—*Held*, on demurrer, that the statement of claim shewed no right of action in respect of the vessel as against the defendant. The Aneroid - - - - 189

—— - - - - - C. A. 3
See Practice. 6.

NEGLIGENCE—Of master of vessel entering dock - - - - - 52
See Collision. 1.

NON-DELIVERY—Of statement of defence 3
See Practice. 6.

ORDER ON DEFENDANT—To deliver up certificate of registry - - - 113
See Practice. 5.

PERSONAM—Action in - - - 29
See Practice. 4.

PRACTICE—*Leave to Appeal from Judgment of County Court in Admiralty*—31 & 32 *Vict. c.* 71, *s.* 27.] An appeal will not lie from a refusal by the judge of the Admiralty Division to allow, under 31 & 32 Vict. c. 71, s. 27, an appeal from a county court judgment to be prosecuted. The Amstel - - - - - C. A. 186

2. —— *Salvage—Costs of Appeal.*] Though in appeals as to the amount of salvage the Judicial Committee of the Privy Council generally did not give a successful appellant his costs of the appeal, such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs. The City of Berlin - - - - - C. A. 187

3. —— *Collision—Foreign Defendants resident Abroad—Counter-claim—Security for Costs.*] A collision occurred between two vessels, the *V.* and the *J. F.*, each owned by foreigners resident abroad. Both vessels were damaged in the collision, and to recover for the damage sustained by the *V.* her owners instituted a cause of collision against the *J. F.* The owners of the *J. F.* appeared as defendants, and delivered a statement of defence and counter-claim claiming that the *V.* should be condemned in the damage sustained by the *J. F.* in the collision, and in costs. On application on behalf of the plaintiffs, the Court ordered the defendants to give security for the plaintiffs' costs. Thereupon the defendants gave security in respect of the costs of the counter-claim only.—At the hearing the Court dismissed the counter-claim, on the ground that the defendants had not given security for the plaintiffs' costs of the whole action. The Julia Fisher [C. A. 115

4. —— *Jurisdiction — Admiralty Action in Personam—The Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 18 — *Rules of Supreme Court, Order XI., Rule* 1—*Appearance under Protest.*] A collision took place at sea, about ten miles from the South Stack Light House, between an American and a Spanish vessel. Both vessels sunk in consequence of the collision, and the owners of the American vessel applied in the registry for leave to issue a writ for service out of the jurisdiction in an action to recover compensation for the loss of their vessel, against a British subject resident in Spain, who was alleged to be one of the owners of the Spanish vessel. The registrar having granted the necessary leave, the writ was issued and service was effected on the defendant in Spain. Thereupon an appearance under protest was entered on his behalf. Afterwards, on these facts being brought before the judge of the Admiralty Court, on motion, the Court ordered

PRACTICE—*continued.*
the action to be dismissed;—*Held*, on appeal, that the order was right.—A defendant in an Admiralty action desiring to object to the jurisdiction of the Court, may enter an appearance under protest, in accordance with the practice in force in the High Court of Admiralty before the coming into operation of the Judicature Acts. —*In re Smith* (1 P. D. 300) followed. The Vivar - - - - - C. A. 29

5. —— *Co-ownership—Order on Defendant to deliver up Certificate of Registry*—17 & 18 *Vict. c.* 104, *s.* 50—*Discontinuance of Action—Costs—Rules of Supreme Court*, 1875, *Order XXIII., Rule* 1; *Order LV., Rule* 1.] The plaintiffs in an action of co-ownership having obtained an order in the cause requiring the defendant to deliver up the certificate of registry of the ship to them, before delivering a statement of claim wholly discontinued the action without leave of the Court. The defendant thereupon applied to have the action dismissed with costs:—*Held*, that the action must be dismissed, and that, under Order XXIII., Rule 1, the defendant was entitled as of right to all the costs of the action. The St. Olaf [C. A. 113

6. —— *Necessaries—Admiralty Action in Rem —Non-delivery of Statement of Defence—Supreme Court of Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 18—*Schedule* 1, *Order XXIX., Rule* 2; *Order XXXVII., Rule* 1.] The second rule of Order XXIX., in the 1st schedule annexed to the Judicature Act, 1875, does not apply to proceedings in an Admiralty action in rem where no statement of defence has been delivered. In such a case the practice, prevailing in the High Court of Admiralty immediately before the coming into operation of the Judicature Acts, must be followed. The Spartoria - - - C. A. 3

REGULATIONS—Articles, 14, 16 - - 8
See Collision. 4.
RULES OF SUPREME COURT, 1875, Order XI., r. 1 - - - - - 29
See Practice. 4.
—— **Order XXIII., r. 1** - - - 113
See Practice. 5.
—— **Order XXIX., r. 2** - - - 3
See Practice. 6.
—— **Order XXXVII., r. 1** - - - 3
See Practice. 6.
—— **Order LV., r. 1** - - - 113
See Practice. 5.

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SALVAGE—*Board of Trade—Steam-tug and Lifeboat belonging to Ramsgate Harbour—The Harbours and Passing Tolls Act*, 1861 (24 & 25 *Vict. c.* 47), *pt. vii.—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 484, 485.] Under the Harbours and Passing Tolls, &c., Act, 1861, Part VII., the harbour of Ramsgate and the property and powers of its trustees are transferred to the Board of Trade. In a suit for salvage remuneration for services rendered by a vessel belonging to the harbour, and vested in the Board, under the provisions of the Act:—*Held*, that the vessel was not "one of Her Majesty's ships" within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 484, 485); and that the claim might be adjudicated upon without the consent of the Admiralty in the section last mentioned. The Cybele - - - - - - 224

2. —— *Inequitable Agreement—Life Salvage.*] A ship with 550 passengers was ashore in the Red Sea. Another ship came up, and refused to take the passengers to their destination for less than 4000*l.* An agreement was thereupon made between the captains of the ships for payment of the 4000*l.* The passengers were taken accordingly, and an action was brought for the 4000*l.*:—*Held*, affirming the decision of the judge of the Admiralty Division, that the agreement was inequitable, and could not be enforced, but that 1800*l.* should be paid for the salvage services. The Medina - - - - C. A. 5

3. —— *Distribution of—Jurisdiction—County Court Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 1—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 498.] A county court, having Admiralty jurisdiction, has jurisdiction to entertain a suit of distribution of salvage where the amount which the Court is asked to apportion does not exceed 300*l.*, notwithstanding that the value of the property saved exceeds 1000*l.* The Glannibanta - - - 45

4. —— *Distribution of—Assignment of Shares of Salvage-money previously earned — Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 18.] A cause of distribution of salvage was instituted on behalf of some of the crew of a steamship against the owners of the steamship. The owners of the steamship appeared to defend the suit, and in their statement of defence, alleged in effect that, subsequently to the salvage services, but before any amount had been paid in respect of such services, fourteen of the plaintiffs had by deed, in consideration of sums varying from 1*l.* to 10*s.* paid them by the defendants, assigned to the defendants all their respective shares of salvage reward. The plaintiffs demurred to the paragraphs of the statement of defence containing these allegations.—The Court sustained the demurrer. The Rosario 41

5. —— *Saving Life—Liability of Cargo*—17 & 18 *Vict. c.* 104, *s.* 458.] A German steamship was wrecked in British waters, and the lives of ten passengers and of some of her crew were saved by certain boats. Subsequently, divers employed by the owners of cargo in the steamship succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners, masters, and crews of the boats against the owners of the specie:—*Held*, by James and Baggallay, L.JJ., affirming the judgment of the judge of the Admiralty Division (Brett, L.J., dissenting), that the plaintiffs were en titled to be

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